Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 23 March 2023 [1]

Case C-590/21

Charles Taylor Adjusting Limited,
FD
v
Starlight Shipping Company,
Overseas Marine Enterprises Inc.

(Request for a preliminary ruling from the Areios Pagos (Court of Cassation, Greece))

(Reference for a preliminary ruling – Area of freedom, security and justice – Judicial cooperation in civil matters – Regulation (EC) No 44/2001 – Recognition and enforcement in a Member State of judgments issued by another Member State – Article 34 – Grounds for refusal – Infringement of public policy of the Member State in which recognition and enforcement are sought – Definition of 'public policy' – Decision preventing the continuation of proceedings commenced before the courts of another Member State or the exercise of the right to judicial protection)

I. Introduction

1. This request for a preliminary ruling lodged by the Areios Pagos (Court of Cassation, Greece) concerns the interpretation of Article 34(1) and Article 45(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. [2]

2. The request has been made in proceedings concerning the recognition and enforcement by a court of a Member State of judgments issued by a court of another Member State which have the effect of deterring parties which had brought proceedings before another court of the former Member State from continuing the proceedings pending before it.

3. It will require that the Court of Justice determine whether the recognition and enforcement of an order to those applicants to pay compensation in respect of the costs of those proceedings, based on the infringement of a settlement agreement terminating a previous action brought by them and imposed by the court designated in that agreement, can be refused as being contrary to public policy within the meaning of Article 34(1) of Regulation No 44/2001.

[1] Original language: French.

[2] OJ 2001 L 12, p. 1.

4. I will set out the reasons why I am of the view that, in such a situation, the principles which led the Court to decide that an anti-suit injunction, namely an injunction intended to prohibit a person from commencing or continuing proceedings before the courts of another Member State, is incompatible with the system established by Regulation No 44/2001, must also be applied.

II. Legal framework

5. Article 34(1) of Regulation No 44/2001 provides:

'A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.'

6. Under Article 45(1) of that regulation:

'The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay.'

III. The facts of the main proceedings and the questions referred for a preliminary ruling

7. On 3 May 2006, the vessel *Alexandros T* sank and was lost, along with its cargo, off the bay of Port Elizabeth (South Africa). The companies Starlight Shipping Company [3] and Overseas Marine Enterprises Inc. [4] – the owner and operator of that vessel, respectively – requested that the insurers of that vessel pay an indemnityon the basis of their contractual liability arising from the occurrence of the insured incident.

8. In view of the refusal of those insurers, Starlight, during the same year, brought proceedings against them before the court having jurisdiction in the United Kingdom of Great Britain and Northern Ireland and, in respect of one of the insurers, by resorting to arbitration. While those proceedings were pending, Starlight, OME and the insurers of the vessel concluded settlement agreements [5] which put an end to the proceedings between the parties. The insurers paid, on the basis of the occurrence of the insured incident and within an agreed period, the insurance indemnity provided for in the insurance contracts, in full and final settlement of all claims in connection with the loss of the vessel *Alexandros T*.

9. Those agreements were ratified on 14 December 2007 and 7 January 2008 by the English court before which the action was pending. It ordered the suspension of any and all subsequent proceedings on the case concerned arising from the same action.

10. Following the conclusion of those agreements, Starlight and OME, along with the other owners and the natural persons legally representing them, brought several actions before the Polymeles Protodikeio Peiraios (Court of First Instance, Piraeus, Greece), including, in particular,

[3] 'Starlight'.

[4] 'OME'.

[5] 'Settlement agreements'. There are three such agreements, dated 13 December 2007 and 7 and 30 January 2008 respectively, with the last agreement being concluded in the context of arbitration.

those of 21 April 2011 and 13 January 2012, against Charles Taylor Adjusting Limited,[6] a legal and technical consultancy which had defended the insurers of the vessel *Alexandros T* against the claims made by Starlight before the English court, and against FD, the director of that consultancy.

11. By those new actions, which were actions in tort, Starlight and OME sought compensation in respect of the material and non-material damage which they had allegedly suffered as a result of the false and defamatory allegations concerning them for which the vessel's insurers and their representatives were responsible. Starlight and OME maintained that, when the initial proceedings for payment of the indemnities owed by the insurers were still pending and the refusal to pay the insurance indemnity persisted, the underwriters and representatives of those insurers had, in the presence of the Ethniki Trapeza tis Ellados (National Bank of Greece), the mortgage creditor of the owner of the sunken vessel and on the insurance market, in particular, spread the false rumour that the loss of the vessel was caused by serious defects in it, of which its owners were aware.

12. In 2011, while those actions were pending, the insurers of the vessel and their representatives, including, in particular, Charles Taylor and FD, the defendants in these proceedings, brought actions against Starlight and OME before the English courts seeking a declaration that the actions brought in Greece constituted infringements of the settlement agreements and requesting that their applications for declarative relief and compensation be granted.

13. Following proceedings at all stages before the English courts, those actions gave rise, on 26 September 2014, to a judgment and two orders of a judge of the High Court of Justice (England & Wales), Queen's Bench Division (Commercial Court) (United Kingdom; 'the High Court'),[7] based on the content of the settlement agreements and on the choice of jurisdiction clause designating that court and awarding the applicants compensation in respect of the proceedings instituted in Greece as well as payment of their costs incurred in England.[8]

14. The Monomeles Protodikeio Peiraios, Naftiko Tmima (Court of First Instance (single judge), Piraeus, Maritime Division, Greece) granted the application made by Charles Taylor and FD on 7 January 2015 seeking recognition of those judgments and a declaration of partial enforceability in Greece, under Regulation No 44/2001.

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

16. By a judgment of 1 July 2019, that court allowed their appeal on the ground that the judgments in respect of which recognition and enforcement are sought contain 'quasi' anti-suit injunctions which impede the action of the persons concerned before the Greek courts, in breach of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms[10] and Article 8(1) and Article 20 of the Syntagma (Greek Constitution), articles which go to the very heart of the concept of 'public policy' in Greece.

6 'Charles Taylor'.

7 'Judgment of the High Court', 'orders of the High Court' and, together, 'the judgment and orders of the High Court'.

8 See, for a detailed account of their content, points 30 to 34 of this Opinion.

9 See point 25 of this Opinion.

10 Signed in Rome on 4 November 1950; 'the ECHR'.

17. Charles Taylor and FD brought an appeal on a point of law against that decision before the Areios Pagos (Court of Cassation). They take the view that the judgment and orders of the High Court are not manifestly contrary to national and EU public policy and do not infringe fundamental principles thereof. They submit that the fact that they were awarded provisional damages on the basis of proceedings commenced in Greece before the actions at issue were brought before the English courts did not prohibit the persons concerned from having continued access to the Greek courts and to judicial protection by them. Consequently, the judgment and orders of the High Court were wrongly treated as though they were anti-suit injunctions.

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

'(1) Is the expression "manifestly contrary to public policy" in the [European Union] and, by extension, to domestic public policy, which constitutes a ground for non-recognition and non-enforcement pursuant to point 1 of Article 34 and Article 45(1) of Regulation No 44/2001, to be understood as meaning that it extends beyond explicit anti-suit injunctions prohibiting the commencement and continuation of proceedings before a court of another Member State to judgments or orders delivered by courts of Member States where: (i) they impede or prevent the claimant in obtaining judicial protection by the court of another Member State or from continuing proceedings already commenced before it; and (ii) is that form of interference in the jurisdiction of a court of another Member State to adjudicate a dispute of which it has already been seised, and which it has admitted, compatible with public policy in the EU? In particular, is it contrary to public policy in the EU within the meaning of point 1 of Article 34 and Article 45(1) of Regulation No 44/2001, to recognise and/or declare enforceable a judgment or order of a court of a Member State awarding provisional damages to claimants seeking recognition and a declaration of enforceability in respect of the costs and expenses incurred by them in bringing an action or continuing proceedings before the court of another Member State, where the reasons given are that: (a) it follows from an examination of that action that the case is covered by a settlement duly established and ratified by the court of the Member State delivering the judgment (or order); and (b) the court of the other Member State seised in a fresh action by the party against which the judgment or order was delivered lacks jurisdiction by virtue of a clause conferring exclusive jurisdiction?

(2) If the first question is answered in the negative, is point 1 of Article 34 of Regulation No 44/2001, as interpreted by the Court of Justice of the European Union, to be understood as constituting a ground for non-recognition and non-enforcement in Greece of the judgment and orders delivered by a court of another Member State (the United Kingdom), as described under [(1)] above, where they are directly and manifestly contrary to national public policy in accordance with fundamental social and legal perceptions which prevail in Greece and the fundamental provisions of Greek law that lie at the very heart of the right to judicial protection (Articles 8 and 20 of the Greek Constitution, Article 33 of the [Astikos Kodikas (Greek Civil Code)] and the principle of protection of that right that underpins the entire system of Greek procedural law, as laid down in [Article 176, Article 173(1) to (3) and Articles 185, 205 and 191] of the [Kodikas Politikis Dikonomias (Greek Code of Civil Procedure)] cited in paragraph 6 of the statement of reasons) and Article 6(1) of the [European Convention on Human Rights], such that, in that case, it is permissible to disapply the principle of EU law on the free movement of judgments, and is the non-recognition resulting therefrom compatible with the views that assimilate and promote the European perspective?'

19. Charles Taylor and FD, Starlight and OME, the Greek and Spanish Governments and the European Commission lodged written observations.

IV. Analysis

20. By its first question, the referring court asks, in essence, whether Article 34(1) of Regulation No 44/2001 must be interpreted as meaning that a court of a Member State can refuse to recognise and enforce a decision on the ground that it is contrary to public policy based on the fact that that decision prevents the continuation of proceedings pending before another court of that Member State, in that it awards to one of the parties provisional damages in respect of the costs and expenses incurred by it in bringing those proceedings, where the reasons given are, first, that the subject matter of those proceedings is covered by a settlement duly established and ratified by the court of the Member State delivering that decision, and, second, that the court of the other Member State before which those proceedings were brought lacks jurisdiction by virtue of a clause conferring exclusive jurisdiction.

21. In this case, the judgment and orders of the High Court for which recognition and enforcement are sought before a Greek court were delivered on 26 September 2014. Regulation No 44/2001 is applicable *ratione temporis* to the case in the main proceedings. [11]

22. That regulation contains specific rules on the recognition and enforcement of judgments which need to be restated, [12] although it should be pointed out that not all of them were retained in Regulation No 1215/2012.

A. Restatement of the rules on recognition and enforcement applicable to the dispute

23. Regulation No 44/2001 provides that 'a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required'. [13] Any interested party who raises the recognition of a judgment as the principal issue in a dispute may apply for a

[11] Under Article 66 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1), Regulation No 44/2001 continues to apply to legal proceedings instituted before 10 January 2015. This is also the case with regard to judgments delivered in the United Kingdom, pursuant to Article 67(2)(a) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7), adopted by Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 1), in force since 1 February 2020, in accordance with Article 185 thereof, with a transition period until 31 December 2020 (Article 126), during which EU law was applicable to the United Kingdom, unless otherwise provided in that agreement (Article 127).

[12] On the principle that the Court's interpretation of the provisions of one of those legal instruments, which also include the Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), signed in Brussels on 27 September 1968, as amended by successive conventions on the accession of new Member States to that convention (OJ 1998 C 27, p. 1) ('the Brussels Convention'), also applies to those of the others, whenever those provisions may be regarded as equivalent, see judgment of 20 June 2022, *London Steam-Ship Owners' Mutual Insurance Association* (C-700/20, EU:C:2022:488, paragraph 42).

[13] Article 33(1). That rule is based on the mutual trust in the administration of justice in the European Union, which is founded on the principle that all Member States comply with EU law, the aim being to ensure the free movement of judgments (see judgments of 16 July 2015, *Diageo Brands*, C-681/13, EU:C:2015:471, paragraph 40 and the case-law cited, and of 12 December 2019, *Aktiva Finants*, C-433/18, EU:C:2019:1074, paragraphs 23 and 25).

decision that the judgment be recognised.[14] For the purposes of enforcing the judgment, a procedure is laid down in Article 38 of that regulation for obtaining, upon application, a declaration of its enforceability in the Member State in which recognition is sought.[15]

24. No review of the substance is conducted at this stage.[16]

25. Under Article 45(1) of Regulation No 44/2001, a court may refuse or revoke a declaration of enforceability on one of the grounds of non-recognition stated in Articles 34 and 35 of that regulation only in the context of an appeal against the judgment relating to the application for such a declaration provided for in Article 43(1) of that regulation.[17]

26. Four general grounds of non-recognition of a judgment are set out in Article 34 of Regulation No 44/2001.[18] Paragraph 1 of that article refers to the case in which 'recognition is manifestly contrary to public policy in the Member State in which recognition is sought'. Under Article 35(3) of that regulation, the test of public policy may not be applied to the rules relating to jurisdiction.[19]

27. The referring court asks whether that ground is applicable in the light of the particular circumstances of the case before it.

B. The particular circumstances of the case in the main proceedings

28. Several factors relating to the procedural context and content of the judgments at issue are worth noting.

1. The procedural context

29. The order for reference concerns the interpretation of the ground for non-recognition and non-enforcement of a judgment because such recognition is contrary to public policy in a procedural context which presents the following characteristics:

– *settlement agreements providing for the exclusive jurisdiction* of an English court were signed by the parties in the main proceedings in the context of an action brought by Starlight on a *contractual basis*;

[14] See Article 33(2) of Regulation No 44/2001. Moreover, a court of a Member State before which recognition of such judgments is raised as an incidental question has jurisdiction over that question (see paragraph 3 of that article).

[15] That procedure was omitted in Regulation No 1215/2012 (see recital 26). See, as a reminder of the review conducted, judgment of 6 September 2012, *Trade Agency* (C-619/10, EU:C:2012:531, paragraphs 43 and 44). Under Article 48 of Regulation No 44/2001, the declaration of enforceability of a foreign judgment which has been given in respect of several matters may be limited, of the court's own motion or at the applicant's request, to some of them which are separable.

[16] See Article 41 and recital 17 of Regulation No 44/2001.

[17] See recital 18 of Regulation No 44/2001. Under Article 43(1) of that regulation, 'the decision on the application for a declaration of enforceability may be appealed against by either party'.

[18] Other grounds are stated in Article 35 of Regulation No 44/2001. That article is devoted to compliance with the criteria on jurisdiction in matters relating to insurance, criteria on jurisdiction over consumer contracts and criteria assigning exclusive jurisdiction, regardless of where the parties are domiciled, as well as to the rule stated in Article 72 of that regulation. Those provisions, which were retained in Article 45(1) of Regulation No 1215/2012, were extended only in respect of individual contracts of employment. See, by way of illustration of the procedural consequences, judgment of 3 April 2014, *Weber* (C-438/12, EU:C:2014:212, paragraphs 54 to 58).

[19] See also judgment of 16 January 2019, *Liberato* (C-386/17, EU:C:2019:24, paragraph 45), and point 53 of this Opinion.

– the defendants in the *action for liability in tort* brought by Starlight and OME before a Greek court after those agreements were concluded obtained from that English court decisions upholding their application for declaratory relief and awarding them an interim payment on account of damages relating to the costs of the proceedings before the Greek court and the payment of sums relating to costs incurred before that English court; and

– as Charles Taylor and FD have pointed out, the recognition and enforcement of that judgment depend on its subject matter.

2. The content of the decisions at issue as set out by the referring court

30. The referring court's questions arise from the content of the judgment and orders of the High Court which it draws from the application made by Charles Taylor and FD.

31. First, those decisions are based on a twofold finding. It was held, by judgment, that the actions brought in Greece infringe the settlement agreements.[20] Those agreements were concluded between the parties which had all been concerned in the proceedings in England and in the arbitration proceedings by allegations that they had been involved in a collective tortious act. The effect produced by those agreements is that any action directed against those parties, on the same ground as that constituting the basis of the proceedings brought in Greece against them, has already been settled by the same agreements, under the joint tortfeasor rule.

32. Furthermore, by orders of the High Court, it was also held that the actions before the Greek courts were brought in breach of the exclusive jurisdiction clause.

33. Second, by two separate orders, Starlight and OME were ordered to pay:

– on the basis of the judgment of the High Court establishing the principle to be applied to the claim and its amount,[21] an interim payment on account of damages due in respect of the proceedings brought in Greece, amounting to a total of 100 000 pounds sterling (GBP) (approximately EUR 128 090),[22] payable no later than 16.30 on 17 October 2014, to cover all losses incurred up to and including 9 September 2014; and

– two sums to cover the costs of the proceedings before the English court, amounting to GBP 120 000 (approximately EUR 153 708), and GBP 30 000 approximately EUR 38 527), payable within the same period, by way of full compensation.

[20] The English court stated that the settlement agreement clauses relieve Charles Taylor and FD (and others) of all liability in respect of any claims that Starlight and OME (or either of them) may have in connection with the loss of the vessel, including all liability in connection with the claims made in the actions brought in Greece.

[21] The referring court cites paragraph 83 of the judgment of the High Court in these terms: '[The applicants] … pursue a claim for damages … The costs they have incurred to date are just short of GBP 163 000. The interim payment sought … is GBP 150 000 or such other sum as the High Court shall determine, in its discretion'. Further on in the order for reference, it is noted that, at that point, it is stated that, in those proceedings, other applicants had sought 'interim payment on account of such damages, in an amount equal to approximately 60% of the costs incurred to date by them in the Greek proceedings'. Moreover, in paragraph 94 of that judgment, also cited in the order for reference, the High Court held that 'an appropriate interim payment on account of those damages is GBP 100 000'. The referring court notes in that regard that 'that consideration is also declaratory in nature and, after assessing the application, it must be considered that, in this case, only the question of recognition arises and not the question of the declaration of its enforceability, since the latter question concerns only the relevant part of the order which followed the judgment'.

[22] At the rate of exchange of 26 September 2014; see point 13 of this Opinion.

34. Third, additional terms are contained in the orders of the High Court in respect of which recognition and a declaration of enforceability were requested from the Greek courts. The referring court restates them as follows:

– 'the two orders [of the High Court] even include, at their beginning, injunctions warning Starlight and OME, and the natural persons representing them that, if they fail to comply with the order, they may be held in contempt of court, their assets may be confiscated, or they may be fined or the natural persons imprisoned (paragraphs 1 to 5)'.

– 'Those orders also contain the following points which were also not included in the appellants' application (recognition and a declaration of enforceability were not requested for these passages):

"4. A decision setting the amount of compensation will be taken against each of the companies Starlight and OME.

5. It will be possible to bring applications for payment of more interim payments on account of those damages [this evidently refers to the situation in which the proceedings before the Greek courts are continued and the applicants' costs are thereby multiplied [23]]."'

– 'And the first order additionally contains the following injunctions:

"8. … each of the companies Starlight and OME will conclude an agreement stipulating that the CTa parties [24] are relieved of all liability in respect of any claims that Starlight and OME may have in the actions brought in Greece against each of the CTa parties, in accordance with the model agreement attached to this order, and Starlight and OME must return the signed originals to the CTa parties' lawyers …

9. If Starlight and OME cannot be located by a reasonable search or if they fail or refuse to sign the agreements by the aforementioned date, an application can be made to Judge Kay QC who will himself enforce those agreements."'

35. In these circumstances, the question arises as to the classification of the judgments for which recognition and enforcement are sought.

C. Classification of the decisions at issue

36. The referring court states that the judgment and orders of the High Court whose exclusive jurisdiction was chosen by the parties in the settlement agreements determine the effects of those agreements on the proceedings pending before the Greek courts.

37. Although those decisions are not directly addressed to the Greek court and do not formally prohibit the continuation of the proceedings before it, they contain grounds relating to the Greek court's jurisdiction in the light of the settlement agreements concluded between the parties and pecuniary awards, including the award of an interim payment on account of damages which acts as a deterrent in that it is not a final amount and depends on the continuation of those

[23] Note of the referring court.

[24] The referring court states that '"CTa" refers to the appellants', namely, Charles Taylor and FD; see point 17 of this Opinion.

proceedings.[25] Moreover, they are accompanied by indissociable penalties and injunctions with a view to ensuring that they are enforced.[26] They are addressed *in personam* to Starlight and OME in order to prevent them from infringing the settlement agreements containing the choice of jurisdiction clause.[27]

38. On the basis of all of those considerations, the referring court is justified, in my view, in classifying the judgment and orders of the High Court as '"quasi" anti-suit injunction proceedings'[28] and in focusing more particularly on the decisions awarding damages for which recognition and enforcement are sought.

39. I am therefore of the opinion that the referring court is right in asking whether the effects of any recognition and enforcement of those decisions are compatible with Regulation No 44/2001 by referring to the Court's case-law on the *handing down* of an anti-suit injunction[29] in order to derive from it a ground of being contrary to public policy.

D. Principles of case-law applicable to anti-suit injunctions

1. Incompatibility with the principle of mutual trust in the review of the jurisdiction of a court of a Member State by a court of another Member State

40. According to the Court's settled case-law,[30] the EU law on jurisdiction precludes the grant of an injunction by a court prohibiting a party from commencing or continuing legal proceedings before a court of another Member State,[31] since it interferes with the latter's jurisdiction to resolve the dispute before it. Such interference is incompatible with the scheme of the Brussels Convention and with Regulation No 44/2001, which is based on the principle of mutual trust.

[25] The referring court also considers that the calculation and award of costs in advance in the guise of provisional damages constitute, in essence, a penalty in disguise.

[26] In the judgment of 10 February 2009, *Allianz and Generali Assicurazioni Generali* (C-185/07, EU:C:2009:69, paragraph 20), the Court had already remarked upon the variety of measures taken in connection with an anti-suit injunction.

[27] See point 34 of this Opinion.

[28] See, in that regard, the expression 'a form of anti-suit injunction' used in paragraph 89 of the judgment of 19 September 2018, *C.E. and N.E.* (C-325/18 PPU and C-375/18 PPU, EU:C:2018:739).

[29] As regards *recognition and enforcement of judgments* prohibiting a party from bringing certain claims before a court of a Member State, the Court has delivered only one judgment (judgment of 13 May 2015, *Gazprom*, C-536/13, EU:C:2015:316). However, the latter judgment is not relevant in this case. It concerned an arbitration award which led the Court to hold, mainly on account of the scope of Regulation No 44/2001, which does not include arbitration, that neither that arbitral award nor the decision by which, as the case may be, the court of a Member State recognises it is capable of affecting the mutual trust between the courts of the various Member States upon which that regulation is based (paragraph 39). It follows from this that proceedings for the recognition and enforcement of an arbitral award are covered by the national and international law applicable in the Member State in which recognition and enforcement are sought (paragraph 41). Likewise, recital 12 of Regulation No 1215/2012 now emphasises that that regulation does not apply to any action or judgment concerning the recognition or enforcement of an arbitral award (see judgment of 20 June 2022, *London Steam-Ship Owners' Mutual Insurance Association*, C-700/20, EU:C:2022:488, paragraph 46).

[30] See judgment of 27 April 2004, *Turner* (C-159/02, EU:C:2004:228, paragraphs 27, 28 and 31). See also judgment of 10 February 2009, *Allianz and Generali Assicurazioni Generali* (C-185/07, EU:C:2009:69), and the summary of that judgment in the judgment of 13 May 2015, *Gazprom* (C-536/13, EU:C:2015:316, paragraphs 32 to 34). See, in the most recent decision, but relating to parental responsibility, judgment of 19 September 2018, *C.E. and N.E.* (C-325/18 PPU and C-375/18 PPU, EU:C:2018:739, paragraph 90).

[31] See, as a reminder of the context in which anti-suit injunctions are used in common law countries, Usunier, L., 'Compétence judiciaire, reconnaissance et exécution des décisions en matière civile et commerciale. – Compétence. – Exceptions à l'exercice de la compétence. – Conflits de procédures. – Articles 29 à 34 du règlement (UE) nº 1215/2012', *JurisClasseur Droit international*, LexisNexis, Paris, 7 October 2015 (last update: 3 August 2022), fascicle 584-170, paragraph 5.

41. Moreover, the Court has rejected various grounds relied on in order to justify such interference:

– the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum State. The Court held that the judgment made as to the abusive nature of the conduct for which the defendant was criticised, consisting of recourse to the jurisdiction of another Member State, implies an assessment of the appropriateness of bringing proceedings before a court of another Member State; [32] and

– the fact of being a party to arbitration proceedings. [33]

42. Thus, the now-settled general principle emerges from that case-law that every court seised is itself to determine, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it, [34] and a party cannot be deprived, on pain of a penalty, of the possibility of bringing proceedings before a court of a Member State which will verify whether it has jurisdiction. [35]

2. Exceptions to the principle of non-review of jurisdiction limited by the EU legislature

43. The Court's case-law states that exceptions to that general principle are authorised to a limited extent by Regulation No 44/2001, that they concern only the stage of recognition or enforcement of judgments and that they are intended to ensure the application of certain rules on special or exclusive jurisdiction laid down only in that regulation. [36]

44. Therefore, in my view, it must be inferred from this that the EU legislature considered that agreements between parties who undertake to refer their disputes to arbitration or designate a court to hear them have no effect on the application of the principle of non-review of jurisdiction. [37]

[32] See judgment of 27 April 2004, *Turner* (C-159/02, EU:C:2004:228, paragraph 28).

[33] See judgments of 10 February 2009, *Allianz and Generali Assicurazioni Generali* (C-185/07, EU:C:2009:69, paragraphs 27 and 28), and of 13 May 2015, *Gazprom* (C-536/13, EU:C:2015:316, paragraph 32).

[34] See judgment of 10 February 2009, *Allianz and Generali Assicurazioni Generali* (C-185/07, EU:C:2009:69, paragraphs 29 and 30).

[35] See, as a reminder of the principle and of its broad conception, judgment of 19 September 2018, *C.E. and N.E.* (C-325/18 PPU and C-375/18 PPU, EU:C:2018:739, paragraphs 90 and 91). See also, to that effect, certain national decisions such as the judgment of the Court of Cassation (France), First Civil Chamber, of 14 October 2009 (Nos 08-16.369 and 08-16.549), and commentaries in particular by Clavel, S., 'Conflits de juridictions. – Exequatur d'un jugement étranger. – Injonction anti-suit. – Ordre public international. – Clause attributive de juridiction. – Clauses de procédure', *Journal du droit international (Clunet)*, LexisNexis, Paris, January 2010, No 1, pp. 146 to 157, in particular p. 152, and by Muir Watt, H., 'La procédure d'*anti-suit injonction* n'est pas contraire à l'ordre public international', *Revue critique de droit international privé*, Dalloz, Paris, 2010, pp. 158 to 163. See also judgment of the High Court of 6 June 2018, *Nori Holding Limited and others* v. *Public Joint-Stock Company 'Bank Otkritie Financial Corporation*', paragraph 90, cited by Law, S., 'Article 29', in Requejo Isidro, M., *Brussels I bis – A Commentary on Regulation (EU) No 1215/2012*, Edward Elgar Publishing Limited, Cheltenham, 2022, pp. 466 to 483, in particular paragraphs 29.52 and 29.54, pp. 481 and 482.

[36] See footnote 18 to this Opinion.

[37] In that regard, it should be pointed out that, although, in the Brussels Convention, an agreement conferring jurisdiction had the effect, according to Article 17 thereof, of designating a court with sole jurisdiction, in Regulations Nos 44/2001 and 1215/2012, that rule was maintained 'unless the parties have agreed otherwise'.

45. The Court has not yet ruled on the latter case.[38] In my view, by analogy with the approach adopted on arbitration in the judgment in *Allianz and Generali Assicurazioni Generali*,[39] a party which brings proceedings before the court of a Member State because it considers that the jurisdiction clause to which it agreed is not applicable cannot be deprived of the judicial protection to which it is entitled.[40]

46. The basis of the prohibition of anti-suit injunctions within the European Union, which is the mutual trust between courts and the absence of any particular provision in Regulation No 1215/2012, which replaced Regulation No 44/2001, justify the extension of the case-law of the Court to cases in which exclusive jurisdiction has been conferred on a court under an agreement between the parties.[41] The effectiveness of that regulation is thereby guaranteed.[42]

E. The ground based on public policy justifying the refusal to recognise and enforce anti-suit injunctions

47. The assessment provided for in Article 34(1) of Regulation No 44/2001[43] of whether recognition is manifestly contrary to the public policy of the Member State in which recognition is sought relates *to the effects produced by the foreign judgment* if it is recognised or enforced,[44] in the light of a European conception of public policy.[45]

48. According to the Court's case-law, Article 34(1) of Regulation No 44/2001 must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of that regulation. Therefore, it may be relied on only in exceptional

38 In *Gjensidige* (C-90/22), now pending before the Court, the Court has received a request for interpretation of Article 45(1)(e)(ii) of Regulation No 1215/2012 (second question) concerning an agreement conferring jurisdiction contained in an international transport contract governed by a specialised international convention and the concept of 'public policy' in that particular context (third question).

39 C-185/07, EU:C:2009:69, paragraphs 26 and 31. The Court held that a national court cannot be prevented from examining the preliminary issue of the validity or applicability of the arbitration agreement and therefore from assessing, at the request of the party concerned, whether an arbitration agreement is void, inoperative or incapable of being performed. I would point out, in this connection, that, in spite of the criticisms expressed in the legal literature following that judgment on account of the special situation of arbitration (see, in particular, Muir Watt, H., op. cit., p. 161), the judgment of 13 May 2015, *Gazprom* (C-536/13, EU:C:2015:316), does not call into question the principles on which that judgment is based. See, to the same effect, judgment of the Court of Cassation (France), First Civil Chamber, of 14 October 2009 (Nos 08-16.369 and 08-16.549), which held that an anti-suit injunction is not contrary to international public policy, its purpose being to ensure compliance with a clause conferring jurisdiction 'outside the scope of Community agreements or Community law'. See, regarding certain comments in the legal literature on that judgment, footnote 35 to this Opinion.

40 The discussion between the parties may, in particular, relate to the substantive condition which must be met by an agreement conferring jurisdiction; in other words, it must relate to 'disputes which have arisen or which may arise in connection with a particular legal relationship' (Article 23(1) of Regulation No 44/2001). See judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 67). The court hearing the case might also be required to verify that the choice of jurisdiction clause does not depart from an exclusive jurisdiction rule or whether the intention has been expressed to depart from it or whether it has been replaced as a result of other circumstances. See, by way of illustration, Legros, C., 'Commerce maritime. – Contrat de transport de marchandises. Responsabilité du transporteur', *JurisClasseur Transport*, LexisNexis, Paris, 25 September 2021, fascicle 1269, II. Conflits de juridictions, paragraph 48. See also, on recognition of a judgment declining jurisdiction on the basis of a jurisdiction clause and its grounds for the clause's validity, judgment of 15 November 2012, *Gothaer Allgemeine Versicherung and Others* (C-456/11, EU:C:2012:719, paragraphs 29 and 41).

41 See, to that effect, Usunier, L., op. cit., paragraph 5. See, also, Legros, C., op. cit., paragraph 48.

42 See, to that effect, judgments of 27 April 2004, *Turner* (C-159/02, EU:C:2004:228, paragraph 29), and of 10 February 2009, *Allianz and Generali Assicurazioni Generali* (C-185/07, EU:C:2009:69, paragraph 24).

43 See points 5 and 26 of this Opinion.

44 See report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 1), in particular p. 44, and judgment of 28 April 2009, *Apostolides* (C-420/07, EU:C:2009:271, paragraph 60 and the case-law cited).

45 See judgment of 28 March 2000, *Krombach* (C-7/98, EU:C:2000:164, paragraphs 25 to 27). See, on that concept, Nowak, J.T. and Richard, V., 'Article 45', in Requejo Isidro, M., *Brussels I bis – A Commentary on Regulation (EU) No 1215/2012*, op. cit., pp. 638 to 678, in particular paragraphs 45.69 to 45.72, pp. 666 to 668, and Mankowski, P., 'Article 45', in Magnus, U. and Mankowski, P., *European Commentaries on Private International Law. Brussels I bis Regulation*, 2nd ed., Otto Schmidt, Cologne, 2023, pp. 842 to 918, in particular paragraph 28 et seq., p. 864 et seq.

cases. The Court reviews the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from another Member State. [46]

49. As regards procedural public policy, [47] the Court adopted a broad definition of the concept referred to in Article 34(1), by holding that it may be relied on, in the event of an obstacle to the right to an effective remedy guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. [48]

50. In the present case, the referring court's question concerns the recognition and enforcement of judgments, based in particular on the infringement of a choice of jurisdiction clause contained in settlement agreements, taken by the court designated by the parties, which determines their financial consequences. [49] In particular, those judgments require that the parties to those agreements, who did not initially bring proceedings before that court, incur, in advance, damages relating to the costs borne by the other parties sued in another Member State.

51. Accompanied by measures intended to ensure their enforcement, those decisions, which were not made on a precautionary basis, provide for the award of other damages in the event of the continuation of the proceedings before the Greek court. By their effects, they therefore considerably exceed the framework of interpretation of settlement agreements and of the review of its jurisdiction by the court designated by the parties to those agreements. [50]

[46] See judgments of 6 September 2012, *Trade Agency* (C-619/10, EU:C:2012:531, paragraphs 48 and 49 and the case-law cited), and of 25 May 2016, *Meroni* (C-559/14, EU:C:2016:349, paragraphs 38 and 40). See, also, judgment of 20 June 2022, *London Steam-Ship Owners' Mutual Insurance Association* (C-700/20, EU:C:2022:488, paragraph 77).

[47] See, in that regard, Gaudemet-Tallon, H. and Ancel, M.-E., *Compétence et exécution des jugements en Europe, Règlements 44/2001 et 1215/2012, Conventions de Bruxelles (1968) et de Lugano (1998 et 2007)*, 6th ed., Librairie générale de droit et de jurisprudence, 'Droit des affaires' collection, Paris, 2018, paragraph 438 et seq., p. 611 et seq., and Nowak, J.T. and Richard, V., op. cit., paragraph 45.82 et seq., p. 671 et seq.

[48] See, to that effect, judgment of 25 May 2016, *Meroni* (C-559/14, EU:C:2016:349, paragraphs 44 to 46 and the case-law cited). Accordingly, the infringement of procedural public policy constitutes a manifest breach of the rights of the defence, subject to the exercise of remedies (paragraphs 48 and 50 of the same judgment and the case-law cited). On the application of that ground for non-recognition of anti-suit injunctions, see Mankowski, P., op. cit., paragraph 31, p. 869.

[49] It must be emphasised that that question does not relate to the merits of awarding damages and interest where a party has infringed a jurisdiction agreement. In that regard, first, it should be noted that, at the recognition stage of a judgment, any review as to its substance is prohibited (see judgments of 25 May 2016, *Meroni*, C-559/14, EU:C:2016:349, paragraph 41, and of 16 January 2019, *Liberato*, C-386/17, EU:C:2019:24, paragraph 54). Second, it is, in my view, nonetheless appropriate to refer to the debate on the matter in the legal literature. See, on the one hand, Gaudemet-Tallon, H. and Ancel, M.-E., op. cit, paragraph 162, p. 215, supporting a negative answer in EU law. See, on the other hand, Brosch, M. and Kahl, L.M., 'Article 25', in Requejo Isidro, M., *Brussels I bis – A Commentary on Regulation (EU) No 1215/2012*, op. cit., pp. 344 to 374, in particular paragraph 25.75, p. 366, in which are cited judgments delivered by the Bundesgerichtshof (Federal Court of Justice, Germany) on 17 October 2019, III ZR 42/19, paragraphs 41 to 45, and by the Tribunal Supremo (Supreme Court, Spain) on 23 February 2007, nº 201/2007, as well as an article of Álvarez González, S., 'The Spanish Tribunal Supremo Grants Damages for Breach of a Choice-of-Court Agreement', *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*, Vol. 29, No 6, Gieseking, Bielefeld, 2009, pp. 529 to 533. I note that in that German judgment relied on by Charles Taylor and FD, the decision awarding damages of the court designated by the parties came after the first court hearing the proceedings verified that it had jurisdiction. See, in particular, commentary of Burianski, M., 'Damages for breach of an exclusive jurisdiction clause', January 2020, available at the following internet address: https://www.whitecase.com/insight-alert/damages-breach-exclusive-jurisdiction-clause.

[50] In that regard, in the case in the main proceedings, the question could arise as to the application of the rules of procedure stated in the judgment of 9 December 2003, *Gasser* (C-116/02, EU:C:2003:657), provided that it is found that the conditions of *lis pendens* were met. Contrary to what the Court had decided, the EU legislature, when Regulation No 44/2001 was recast, gave priority to the court of the chosen place of jurisdiction for the purpose of confirming jurisdiction on the conditions specified in Article 31(2) and (3) of Regulation No 1215/2012, including that of its being seised of the dispute. On that last essential condition, see, especially in this instance, Usunier, L., op. cit., paragraph 29. On the extension of that approach to situations in which Regulation No 44/2001 is applicable, see Gaudemet-Tallon, H. and Ancel, M.-E., op. cit, paragraph 367, p. 534. It should also be noted that, at the stage of recognition of a foreign judgment, failure to comply with the rules of *lis pendens* does not preclude such recognition. See judgment of 16 January 2019, *Liberato* (C-386/17, EU:C:2019:24, paragraph 52).

52. Accordingly, when viewed in their proper context, specifically the orders of the High Court undeniably have the effect of deterring the parties concerned from bringing their action. For that reason alone, they indirectly impede access to the sole court seised of the substance of the dispute which, under Regulation No 44/2001, has the power to rule on its jurisdiction, bring the proceedings to their conclusion and rule on the costs of the proceedings brought before it and any claims for compensation relating thereto.

53. Considering that it is for that court to conduct a comprehensive assessment of the proceedings and all the circumstances,[51] the referring court submits – rightly, in my view – that recognition and enforcement of the judgment and orders of the High Court are manifestly incompatible with the public policy of the forum State, arguing that they infringe the fundamental principle, in the European judicial area based on mutual trust,[52] that every court is to rule on its own jurisdiction. I would recall that that principle led the Court to state that, in all circumstances, it precludes the giving of decisions directly or indirectly prohibiting the continuation of proceedings brought in another Member State.

54. In other words, by virtue of the systemic foundation of that prohibition, no exception to it can be admitted, unless it gives effect to a decision which would have been prohibited in direct proceedings.

55. Therefore, I propose that the Court answer the first question for a preliminary ruling in the affirmative and, accordingly, find that there is no need to answer the second question.

V. Conclusion

56. In the light of all the foregoing considerations, I propose that the Court of Justice answer the questions referred for a preliminary ruling by the Areios Pagos (Court of Cassation, Greece) as follows:

Article 34(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

must be interpreted as meaning that a court of a Member State can refuse to recognise and enforce a decision on the ground that it is contrary to public policy based on the fact that that decision prevents the continuation of proceedings pending before another court of that Member State, in that it awards to one of the parties provisional damages in respect of the costs and expenses incurred by it in bringing those proceedings, where the reasons given are, first, that the subject matter of those proceedings is covered by a settlement duly established and ratified by the court of the Member State delivering that decision, and, second, that the court of the other Member State before which those proceedings were brought lacks jurisdiction by virtue of a clause conferring exclusive jurisdiction.

[51] See, to that effect, judgment of 2 April 2009, *Gambazzi* (C-394/07, EU:C:2009:219, paragraph 48).

[52] See point 40 of this Opinion.