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Angaben zur Veröffentlichung / Publication details:

Lutzi, Tobias. 2024. "What remains of H Limited? Recognition and enforcement of non-EU judgments after Brexit." *Journal of Private International Law* 20 (3): 651–67.
https://doi.org/10.1080/17441048.2024.2439152.

What Remains of H Limited?

Recognition and Enforcement of Non-EU Judgments After Brexit

Tobias Lutzi*

In its controversial decision in H Limited, *the Court of Justice held that an English confirmation judgment, transforming two Jordanian judgments into an English one, constituted a judgment in the sense of Art. 2(a), 39 Brussels Ia and, as such, qualified for automatic recognition and enforcement in all Member States. The decision has been heavily criticized for seemingly violating the rule against double exequatur and potentially opening a backdoor into the European Area of Justice. As the particular door in question has already been closed with the UK's completed withdrawal from the EU, though, crafty judgment creditors will have to look to other Member States. This paper will make an attempt at identifying those jurisdictions to which they might look. For this purpose, it will first argue that for an enforcement decision to fall under Chapter III of the Regulation, two requirements must be fulfilled: It must be a new decision on the judgment debt (rather than a mere declaration of enforceability) and it must have come out of adversarial proceedings. Second, the paper will look in more detail at a selection of jurisdictions that might fulfil these two requirements.*

Keywords: recognition; enforcement; non-EU judgments; double exequatur

A. Background: Enforcing Non-EU Judgments in the EU

The hard line that the Brussels Ia Regulation[1] notoriously draws between EU- and non-EU cases is nowhere as evident as in its Chapter III, which governs the recognition and enforcement of foreign judgments.[2] By the unambiguous wording of Art. 36(1) and 39, it is limited to 'judgments given in a Member State', putting the creditors of those judgments into a highly privileged position:[3] judgments emanating from EU Member States are automatically recognized in all other Member States under Art. 36(1) and directly enforceable without any

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1 Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 2012 OJ L351/1, 15.

2 For criticism of the distinction, in particular with regard to its incongruence with Chapter II, see T Hartley, *International Commercial Litigation* (Cambridge University Press, 3rd edn, 2020), 384–385 and 431–32: 'Most of the defects [of the provisions of Chapter III of the Regulation] stem from the unwillingness of those responsible for its drafting to give fair consideration to the interests of States outside Europe or of persons resident or doing business there.' See also the recent remarks by AG Emiliou, Opinion on Case C-339/22 *BSH Hausgeräte* ECLI:EU:C:2024:159, para. 101, who considers the Regulation's inability to adequately accommodate non-EU cases a 'design flaw'.

3 See also Hartley, *supra* n 2, 385–86; V Lazić and P Mankowski, *The Brussels I-Bis Regulation* (Edward Elgar Publishing, 2023), paras. 7.002–03, 7.288–89.

additional proceedings under Art. 39 of the Regulation,[4] regardless of whether the court of origin had based its jurisdiction on the Regulation or on national law.[5] In fact, whether this court had jurisdiction at all is only verified in a limited number of cases that forms part of the short list of defences available to the debtor.[6]

In contrast, the recognition and enforcement of judgments from non-EU countries continues to depend on the national law[7] of each Member State of enforcement. Under the relevant national laws, recognition and enforcement are usually subject to much longer lists of (positive and negative) requirements including the jurisdiction of the court of origin,[8] reciprocity,[9] the correct selection of the applicable law,[10] or even 'the correct application of the law'[11]. Enforcement also requires either a judicial declaration of enforceability (*exequatur*) or a new judgment from a national court.[12]

If a judgment creditor were able to obtain such a declaration or judgment from a Member State in order to enforce a non-EU decision, though, would this decision then have to be recognized and enforced in *other* Member States under Chapter III of the Regulation?

Until recently, it had been very much universally agreed that the answer must be 'No'. Regardless of how the foreign decision is transposed into the legal system where enforcement is sought, the act of transposition (i.e. declaration of enforceability or new domestic judgment) could not itself be recognized and enforced in another country: *exequatur sur exequatur ne vaut*.[13] Indeed, the CJEU had held in its seminal decision in *Owens Bank* that the Brussels Convention 'does not apply to proceedings for the enforcement of judgments given in civil and commercial matters in non-contracting States.'[14] Instead, a judgment creditor seeking enforcement of a non-EU judgment in more than one Member State would have to bring the original judgment to each of them.

But this orthodoxy has been openly challenged in 2022 by the CJEU's highly controversial decision in *H Limited*, with the Court considering an English confirmation judgment to

[4] Lazić and Mankowski, *supra* n 3, para. 7.002: 'a seminal and ground-breaking policy decision.'
[5] See Hartley, *supra* n 2, 384–85; G van Calster, *European Private International Law. Commercial Litigation in the EU* (Hart, 4th edn, 2024), para. 2.602.
[6] See Art. 46(1)(e) Brussels Ia.
[7] National law is understood to refer to the domestic rules on recognition and enforcement that apply to judgments from countries to which the enforcing state is not bound by a bilateral or multilateral treaty in this area. In some Member States, a significant number of judgments will in fact be governed by provisions implementing such treaties, although their shape varies far too widely to make any definite statement as to the degree to which they might fall under *H Limited*.
[8] International jurisdiction of the court of origin is arguably the most prevalent requirement in the domestic laws of the Member States; it can either be assessed on the basis of the law of the country of origin (see, eg, Art. 1096(1) of the Romanian Code of Civil Procedure (Law no. 134/2010)) or through the lens of the *lex fori* (see, eg, § 407(1) of the Austrian Execution Act (*Exekutionsordnung*)).
[9] See, eg, §§ 723(2) cl. 2, 328(1) No. 5 of the German Civil Procedure Code (*Zivilprozessordnung*).
[10] See Section 637(2) 7) of the Latvian Civil Procedure Law (*Civilprocesa likums*).
[11] See Arts. 827(1)(a), 811(e) of the Maltese Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta).
[12] See in more detail below, under B.1.
[13] See, e.g., Lazić and Mankowski, *supra* n 3, paras. 1.171 and 1.182; *Dicey, Morris and Collins on the Conflict of Laws: Companion Volume* (Sweet & Maxwell, 16th edn, 2023), para. CompV14-012; T Hartley, *Civil Jurisdiction and Judgments in Europe* (Oxford University Press, 2nd edn, 2023), para. 16.04; H Muir Watt, "Exequatur sur exequatur vaut parfaitement", [2023] *Revue critique de droit international privé* 135; H Kall, "Doppelexequatur: 'ne vaut' oder 'no worries'?" [2018] *Internationales Handelsrecht* 137. See also Higher Regional Court (*Oberlandesgericht*) Brandenburg, 11 July 2016, BeckRS 2016, 14937, para. 22.
[14] Case C-129/92 *Owens Bank* ECLI:EU:C:1994:13, para. 25.

qualify as a judgment in the sense of Art. 2(a) of the Regulation, which would thus fall under Chapter III of the Regulation (see below, B.1.). By seemingly sanctioning an instance of 'double exequatur', the decision has been seen as opening a backdoor into enforcement under the Regulation by using an English confirmation judgment as a 'trojan horse' (below, B.2.). Yet, as the UK had already left the EU (including the Brussels Ia Regulation) when the CJEU's decision was rendered, crafty judgment creditors will have to look for other Member States. In order to identify other jurisdictions to which the decision in *H Limited* could realistically be applied, this paper will proceed in two steps: First, it will identify the two requirements that result from the decision in *H Limited*: it will argue that the decision only applies to legal systems in which foreign judgments are enforced through a domestic decision on the judgment debt, rather than through a judicial declaration of enforceability (below, C.1.). In addition, the domestic decision needs to be based on sufficiently adversarial proceedings (below, C.2.). Second, this paper will take a closer look at a number of jurisdictions that might fulfil those two requirements (below, D.).

B. The Court of Justice's Decision in *H Limited*

1. Confirmation Judgments and Brussels Ia

The CJEU's decision arguably is a direct consequence of the peculiar way in which foreign judgments are enforced under English common law (a.). It explains why the Court – albeit wrongly – considered an English enforcement decision to be a judgment in the sense of the Regulation (b.).

a. Enforcement of Foreign Judgments in England

Unlike most continental legal systems, the English common law does not provide a mechanism through which foreign judgments can be registered, and thus enforced. Instead, absent bilateral or multilateral treaties,[15] any judgment creditor wishing to enforce a foreign judgment in England needs to obtain a new English judgment. But in many cases, this sounds more onerous than it is.[16]

For non-money judgments (i.e. judgments awarding the claimant anything other than a definite sum of money), it is true that the judgment creditor needs to start new proceedings in England based on the original cause of action (e.g. a contractual obligation). But these proceedings can be significantly expedited if the claimant manages to show that any substantive question is *res iudicata* as a result of the foreign judgment.[17] Indeed, if the requirements for recognition are met, the foreign judgment may give rise to an issue estoppel and prevent the defendant from denying any matter of fact or law that has already been decided by the foreign court.[18] In this case, the English court may render a summary judgment[19] as to liability and will only need to decide on the appropriate remedy.[20]

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[15] See above, fn. 7.
[16] See *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell, 16th edn, 2023), para. 14-012: 'The speed and simplicity of this procedure coupled with the tendency of English judges narrowly to circumscribe the defences that may be pleaded to a claim on a foreign judgment, mean that foreign judgments are in practice enforceable at common law much more easily than they are in many foreign countries.'
[17] Dicey, *supra* n 16, paras. 14R-012 (fn. 95) and 14-026.
[18] See *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd* [1967] 1 A.C. 853, 917–918, 925–928, 967 (HL); *The Sennar (No. 2)* [1985] 1 WLR 490, 499 (HL); Dicey, *supra* n 16, para. 14-036.
[19] See Civil Procedure Rules (CPR), r. 24.2.
[20] Dicey, *supra* n 16, paras. 14R-012 (fn. 95) and 14-026.

For judgments awarding the claimant a definite sum of money, on the other hand, the judgment creditor may bring an action upon the debt resulting from the foreign judgment.[21] Under the 'doctrine of obligation', such judgment debts can be enforced in an English court.[22] The claim upon the judgment will still be tried in regular, adversarial proceedings, but the High Court will only verify a limited number of questions: whether the court of origin had international jurisdiction;[23] whether the foreign judgment is final and conclusive, i.e. whether it is treated as *res iudicata* in the foreign forum;[24] and whether the judgment debtor has a defence to recognition (e.g. irreconciliability with English public policy).[25] There is no review for errors of law or fact.[26] Just as for non-money judgments, the claimant may apply for a summary judgment on the ground that the defendant has no prospect of successfully defending the claim.[27] In any case, if the foreign judgment is established to be *res iudicata*, the High Court will issue a 'confirmation judgment'[28] ordering the judgment debtor to pay the sum owed under the judgment. This procedure has rightly been described as having 'a largely formal character'[29] and to 'closely resemble'[30] exequatur.[31]

Although both mechanisms indeed share many similarities – including the lack of any review of the merits of the foreign decision –, they remain fundamentally different: one allows the judgment creditor to recover the *original* debt by enforcing the *foreign* judgment in the jurisdiction while the other one enables the judgment creditor to recover the *judgment* debt by virtue of a new *domestic* judgment.

b. Enforcement of an English Confirmation Judgment under the Regulation

In *H Limited*, the claimant sought to enforce such a confirmation judgment in Austria. The judgment had been rendered by the High Court in 2019,[32] based on two Jordanian decisions from 2013 ordering the Austrian defendant to pay a sum of roughly US$ 10,000,000 plus interest and costs to the claimant bank. As described above, the High Court had assessed, through adversarial proceedings, in a summary hearing, the binding nature of the judgment as

[21] Sometimes referred to as an 'actio judicati': see Opinion on Case C-568/20 *H Limited* ECLI:EU:C:2021:1026, para. 32; H Muir Watt, *supra* n 13, sub II.A.
[22] *Schibsby v Westenholz and ors* [LR] 6 QB 155, 159 (Blackburn J): 'the true principle on which the judgments of foreign tribunals are enforced in England is […] that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce.' For a nuanced commentary, see J Folkard and I Bergson, "*Godard v Gray* and *Schibsby v Westenholz* (1870)", in W Day and L Merrett (eds), *Landmark Cases in Private International Law* (Hart 2023), 87 et seq. See also Hartley, *supra* n 2, 434–35.
[23] See *Adams v Cape Industries* [1990] Ch 433 (CA).
[24] See *Nouvion v Freeman* (1889) App. Cas. 1, 9; Dicey, *supra* n 16, para. 14-027.
[25] See *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7.
[26] See *JSC VTB Bank v Skurikhin & Ors* [2014] EWHC 271 (Comm), para. 18: 'A foreign judgment for a definite sum, which is final and conclusive on the merits, is enforceable by claim, and is unimpeachable (as to the matters adjudicated on) for error of law or fact' (Simon J).
[27] CPR rr. 24.2, 24.3(a); Dicey, *supra* n 16, paras. 14-032.
[28] Sometimes also referred to as a 'merger judgment', which more commonly refers to decisions based on a foreign arbitral award, though.
[29] Dicey, *supra* n 16, paras. 14-032.
[30] Lazić and Mankowski, *supra* n 3, para. 1.182.
[31] See also similar statements by H Muir Watt, *supra* n 13, sub II.A.; L Oppolzer, "Das Doppelexequatur im Anwendungsbereich der EuGVVO und dessen Begrenzung durch den ordre public" [2022] Europäische Zeitschrift für Wirtschaftsrecht 516, 517.
[32] *Arab Jordan Investment Bank Plc & Anor v Sharbain* [2019] EWHC 860 (Comm).

res iudicata, without making any determination as to the substance of the claim.[33] The High Court had also issued a certificate under Art. 53 Brussels Ia.[34]

On this basis, the Austrian courts of first and second instance had granted the claimant leave to enforce the English decision in Austria. Upon appeal, though, the *Oberster Gerichtshof* referred the case to the CJEU, citing concerns about a potential 'double exequatur'.[35]

These concerns were dismissed by the Court of Justice without much ado. It emphasized that the Regulation's objective of free circulation of judgments[36] made it necessary to disassociate the notion of judgment in the sense of Art. 2(a) from its content.[37] Instead, judicial decisions from other Member States fall within the scope of the Regulation as soon as 'they are judicial decisions which, before their recognition and enforcement are sought in a State other than the State of origin, have been, or have been capable of being, the subject, in that State of origin and under various procedures, of an inquiry in adversarial proceedings'.[38] Any additional inquiry as to the content of the proceedings would risk violating the principle of mutual trust.[39] In other words: a judgment is a judgment is a judgment.

And thus, an English confirmation judgment also constitutes a judgment in the sense of Art. 2(a).[40]

2. A Backdoor into the European Area of Justice?

The CJEU's decision has been met with equal amounts of surprise and criticism. In addition to the obvious tension with the Court's earlier decision in *Owens Bank*[41] and with the previously unquestioned maxim of *exequatur sur exequatur ne vaut*, commentators have been quick to warn that the decision might open a backdoor into the European Area of Justice as judgment creditors could bypass the strict requirements of an intended state of enforcement by first seeking enforcement in another, less restrictive Member State and use the resulting confirmation judgment as a 'trojan horse' into the actually intended state of enforcement.[42] *Horatia Muir Watt* speaks of 'judgment laundering'.[43] And unsurprisingly, international law firms have been quick to welcome this 'new enforcement mechanism'.[44]

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[33] Case C-568/20 *H Limited* ECLI:EU:C:2022:264, paras. 17, 20, 32.
[34] *H Limited*, *supra* n 33, para. 12.
[35] OGH, 23 September 2020, 3 Ob 126/20f, paras. 24–28.
[36] Recital (6) Brussels Ia.
[37] *H Limited*, *supra* n 33, paras. 24, 28.
[38] *H Limited*, *supra* n 33, para. 26.
[39] *H Limited*, *supra* n 33, paras. 29–31.
[40] *H Limited*, *supra* n 33, para. 32.
[41] See above, under A.
[42] See V Richard, "The CJEU on Double Exequatur", *The EAPIL Blog*, 8 April 2022, eapil.org/2022/04/08/the-cjeu-on-double-exequatur/. See also TAG Bens, "Hof van Justitie EU, 7 april 2022, nr. C-568/20", [2022] Jurisprudentie Burgerlijk Procesrecht 923 (No. 68), 923, 927; Muir Watt, *supra* n 13; F Mailhé, "XXI. Droit international privé – Cour de justice, 3e ch., 7 avril 2022, H Limited", in F Picod (ed): *Jurisprudence de la CJUE 2022. Décisions et commentaires* (Bruylant, 2024), 1062; J Antomo, "Art. 2 Brussels Ia", in V Vorwerk and C Wolf (eds), *BeckOK ZPO* (CH Beck, 52nd edn, 2024), para. 23; M Neumayr, "Art. 39 Brussels Ia", ibid, para. 11b; Hess, "Exequatur sur exequatur (ne) vaut? Der EuGH erweitertet die Freizügigkeit von Drittstaatenurteilen nach Art. 39 ff. EuGVVO" [2022] IPRax 349.
[43] Muir Watt, *supra* n 13, sub II.B.
[44] See E Mizrahi, C Dargham and R Nader-Guéroult, "CJEU gives creditors additional enforcement mechanism", *Norton Rose Fulbright*, April 2022, nortonrosefulbright.com/fr-ca/centre-du-savoir/publications/af303316/cjeu-gives-creditors-additional-enforcement-mechanism.

Seemingly to mitigate this risk (and somewhat following the line of reasoning of AG *Pikamae*),[45] the Court of Justice went on to emphasize that putting enforcement of the English judgment under the Brussels Ia Regulation also rendered applicable the exceptions to enforcement listed in its Art. 45. In particular, the Austrian courts would remain free to refuse enforcement based on the public policy exception in Art. 45(1)(a), 46 Brussels Ia if 'it was impossible for [the defendant] to contest, in the Member State of origin, the substance of the claims which gave rise to the Jordanian judgments forming the subject matter of the order at issue in the main proceedings.'[46]

On a very generous reading, the Court's decision could thus be understood to merely shift the burden of proof: rather than assessing the degree to which the judgment from another Member State made a substantive determination *motu proprio* in order to find out if it constitutes a judgment in the sense of the Regulation, the enforcing court would only have to make this determination if the judgment debtor considers the impossibility to contest the substance of the original claim – which is, of course, the norm for a confirmation judgment – a violation of public policy.[47] Surprisingly, though, the Austrian courts declined to make this determination in the case at hand, despite the explicit invitation by the CJEU and although the defence had been raised by the judgment debtor.[48]

As an alternative to relying on a potential exception to recognition and enforcement, it has also been suggested that judgment debtors might try to pre-empt their creditors by seeking a declaration of non-enforceability of the foreign decision, which, if granted, might block the enforcement of the confirmation judgment in the Member State (under Arts. 45(1)(d), 46 Brussels Ia) or even in other Member States (under Arts. 45(1)(d), 46 Brussels Ia).[49]

C. The Scope of *H Limited*

As the UK had already completed its withdrawal from the European Union[50] when the CJEU rendered its decision in *H Limited*, judgment debtors do not need to worry about English confirmation judgments: the particular backdoor opened by the CJEU in *H Limited* has already been closed for good. But of course, crafty judgment creditors may look elsewhere. The rest of this paper will be dedicated to working out where.

For an enforcement mechanism to fall within the scope of *H Limited*, it arguably needs to fulfil two requirements: enforcement needs to happen through an action upon the judgment, not through exequatur proceedings (1.); and the enforcement proceedings need to be sufficiently adversarial (2.).

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[45] See Opinion on *H Limited* (n 21), paras. 28 et seq. Importantly, though, the AG did not consider the English judgment to constitute a judgment in the sense of Articles 2(a), 39 Brussels Ia.

[46] *H Limited*, *supra* n 31, para. 46.

[47] For such an interpretation, see Muir Watt, *supra* n 13, and T Krümmel, "Anerkennungsfähigkeit eines englischen Vollstreckungsbeschlusses über rechtskräftige Urteile aus Drittstaat" [2022] *Zeitschrift für Internationales Wirtschaftsrecht* 187, 188. See also Hartley, *supra* n 13, para. 16.06. As such a reading would still effectively reduce all requirements and safeguards of domestic law regarding third-country judgments (see above, n 8–11) to a public-policy test (once the judgment has been successfully enforced in one Member State), it also raises a question as to the EU's competence to regulate enforcement of such judgments.

[48] See PL Eichmüller, "H Limited – The Austrian Sequel", *The EAPIL Blog*, 25 July 2022, eapil.org/2022/07/25/h-limited-the-austrian-sequel/.

[49] See Richard, *supra* n 42. But see also Muir Watt, *supra* n 13, sub II.B.

[50] On 1 January 2021, as per the EU-UK Withdrawal Agreement.

1. Actions Upon a Foreign Judgment

While some commentators seem open to the idea that the decision in *H Limited* could be equally applicable to confirmation judgments resulting from an action upon a foreign judgment and to declarations of enforceability resulting from exequatur proceedings (as long as the latter are sufficiently adversarial[51]),[52] it is submitted that a narrower reading that only applies to the first group of cases is more convincing.[53]

This is for two reasons.

a. Differences in Enforcement Mechanisms

Despite the aforementioned practical similarities between an English confirmation judgment and continental exequatur proceedings, they remain two fundamentally different mechanisms: with an action upon a foreign judgment, the claimant seeks a decision from the court on the defendant's liability for the judgment debt; if this debt is sufficiently established, the defendant is ordered to pay a sum of money to the claimant (or perform another type of remedy)[54]. In exequatur proceedings, the claimant seeks a confirmation that the foreign decision (ordering the claimant to pay a sum of money or other type of remedy based on the original cause of action) is enforceable in the jurisdiction. This has two important consequences.

First, the territorial scope of the exequatur decision is necessarily limited to the territory of the Member State in which enforcement is sought.[55] While it could be argued that this is true for all judicial orders (because any national court's competence is necessarily limited to its respective territory by public international law),[56] the exequatur decision is different in the sense that the claimant only seeks, and the court only allows, enforcement of the decision within a specific jurisdiction.[57]

Second, and more importantly, the declaration of enforceability resulting from exequatur lacks any enforceable content. It merely confirms that the foreign decision can be enforced in the jurisdiction without making any determination as to the liability of the defendant. Indeed,

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[51] As to which requirement, see below, sub C.2.

[52] Specifically H Muir Watt, *supra* n 13, sub II.A.: 'La solution consacrée par la Cour de justice ici […] souligne bien le caractère arbitraire de toute distinction selon le type de procédure'; see also V Lazić and P Mankowski, *supra* n 3, para. 1.183; M Neumayr, *supra* n 42, para. 11b; L Oppolzer, *supra* n 29, 518–19; Bens, *supra* n 42, 926–927.

[53] For similar views, see G van Calster, "J v H Limited. CJEU holds third country judgments may, under circumstances, be smuggled into Brussels Ia via the backdoor. Yet they will be vulnerable to ordre public exceptions.", gavclaw, 19 April 2022, gavclaw.com/2022/04/19/j-v-h-limited-cjeu-holds-third-country-judgments-may-under-circumstances-be-smuggled-into-brussels-ia-via-the-backdoor-yet-they-will-be-vulnerable-to-ordre-public-exceptions/; B Deshayes and M-L Fritscher, "Die Vollstreckung eines mitgliedstaatlichen Zahlungsbefehls auf der Grundlage eines drittstaatlichen Urteils in einem anderen Mitgliedstaat – Zur Auslegung des Begriffs der 'Entscheidung' gemäß Art. 2 a EuGVVO" [2022] *Zeitschrift für Internationales Wirtschaftsrecht* 235, 238; Stadler, "Art. 2 Brussels Ia", in W Voit (ed), *Musielak/Voit. ZPO* (Vahlen, 21st edn, 2024), para. 6.

[54] While the decision in *H Limited* concerned a money judgment, there is no reason to believe that it does not apply *a fortiori* to non-money judgments, which require a more complete inquiry as to the defendant's liability: see above, sub B.1.

[55] See also M Trenker, "Anerkennung eines englischen Vollstreckungsurteils" [2022] *Leitsätze mit Kommentierung* 807507, sub 3.; C Koller, "Art. 2 Brussels Ia", in R Bork and H Roth (eds), *Stein/Jonas. Kommentar zur Zivilprozessordnung* (Mohr Siebeck, 23th edn, 2022), para. 8.

[56] See Kall, *supra* n 13, 139.

[57] See also Bundesgerichtshof, 2 July 2009, IX ZR 152/06, para. 33 (refusing enforcement of an English merger decision based on an arbitral award).

Jabez Henry wrote as early as 1823 that the 'judge in execution' was 'clearly incompetent' to make any such order: '*judex exequens merus est executor nec assumit in se partes judicis*.'[58] Consequently, it does not constitute 'a judgment […] which is *enforceable'* in the sense of Art. 39 Brussels Ia.[59]

But the same cannot be said about confirmation judgments like the one in in *H Limited*. The decision ordered the defendant bank to pay US$ 10,000,000 (plus interest) because they owed this amount to the claimant, albeit as a result of the Jordanian judgment. This is what led the CJEU, in a misguided attempt to isolate the formal existence of a judgment from its substance and function, to (wrongly) consider it a judgment in the sense of Chapter III. But the same difference that arguably explains the Court's decision also makes it possible to limit its effects to those jurisdictions where foreign judgments are enforced through a new decision on the merits.

b. Coherence with Owens Bank

Such a narrow reading of the decision in *H Limited* also has the advantage of making it easier to reconcile with the Court's earlier decision in *Owens Bank*[60] (which the *H Limited* court acknowledged on two occasions[61]).

On a very narrow reading of *Owens Bank*, one might consider the decision to only apply to *ongoing* exequatur proceedings (which the referring English court considered a potential impediment to its own enforcement proceedings of a judgment from Saint Vincent and the Grenadines)[62] but not to the resulting decision. Yet, neither the wording of the decision nor the systemic arguments made by the Court support such a reading. What is more, if enforcement proceedings (of any shape or form) were categorically excluded from the *lis pendens* provisions of Chapter II of the Regulation but the resulting decisions would still have to be recognized and enforced under Chapter III, the Member States' national autonomy *vis-à-vis* non-EU judgments, which the *Owens Bank* court tried to protect,[63] could still easily be circumvented: as soon as a judgment creditor obtained an enforcement decision from any Member State, the decision would have to be enforced in all other Member States, even if separate enforcement proceedings were pending[64] there. Accordingly, it seems more consistent with the logic of the decision to understand it to apply to the entire enforcement proceedings, including the resulting decision.[65]

Such a broad reading can still be reconciled with the decision in *H Limited* if one focuses on the specific type of enforcement proceedings that gave rise to the respective references in the two cases. In *Owens Bank*, the CJEU had been asked to assess the impact of pending Italian exequatur proceedings on enforcement proceedings in England: it considered them to lie wholly outside the scope of the Regulation. In *H Limited*, the CJEU was asked to consider the relevance of an English confirmation judgment: the Court considered it to fall into Chapter III

[58] J Henry, *The Judgment Of The Court Of Demerara, In The Case Of Odwin V. Forbes* (Sweet 1823), 75.
[59] But see Muir Watt, *supra* n 13, sub II.A.:
[60] *supra* n 14.
[61] *H Limited*, *supra* n 31, paras. 36, 38.
[62] Given the origin of the original judgment, those proceedings were not subject to common law rules, but to the Administration of Justice Act 1920.
[63] See *Owens Bank*, *supra* n 14, para. 30.
[64] If enforcement of the original decision had already been refused in a Member State, this domestic decision would arguably prevent enforcement of the foreign enforcement decision, at least in this Member State, pursuant to Arts. 46, 45(1)(c): see above, at n 49.
[65] See also Bundesgerichtshof, 2 July 2009, *supra* n 57, paras. 14, 22.

of the Regulation. Indeed, the Court's distinction of *Owens Bank* in *H Limited*[66] can be read this way.

c. Conclusion

For these reasons, any potential to rely on the decision in *H Limited* to smuggle non-EU judgments into the EU through the backdoor of a particularly generous enforcement regime must be limited to those jurisdictions that enforce foreign judgments through an action upon a foreign judgment. It goes without saying that within those jurisdictions, it can only apply to decisions that are actually enforced through a new judgment but not to decisions that can be registered and/or enforced pursuant to a bilateral or multilateral treaty.

2. Adversarial Proceedings

Whereas the distinction between confirmation judgments and exequatur proceedings is merely implied in *H Limited*, the decision also mentions one actual requirement: the confirmation judgment must 'have been, or have been capable of being, the subject of an inquiry in adversarial proceedings.'[67] In the case at hand, this requirement was satisfied because it was apparent from the order for reference 'that the High Court order at issue in the main proceedings was, at the very least, the subject of a summary hearing in the Member State of origin.'[68]

Judging from the English proceedings that gave rise to the Austrian reference in *H Limited*, the threshold of this requirement cannot be very high. While the judgment debtor was indeed given an opportunity to oppose enforcement of the Jordanian decision, the only argument with which they could be heard was the fact that the Jordanian judgment was not final and conclusive; but no substantial defense was allowed.[69]

Still, the minimum requirement of (potentially) adversarial proceedings should exclude from the scope of *H Limited* any enforcement proceedings that merely rubber-stamp the submissions of the claimant.[70] But if one follows the proposition of this paper (above, under C.1.), then this should not be of much relevance: Indeed, as the analysis below (under D.) will show, there does not appear to be a single jurisdiction that enforces foreign judgments through a new domestic judgment without also offering the defendant at the very least the option to request a summary hearing.

D. *H Limited* applied

Regarding specific jurisdictions, three immediately come to mind for their common-law heritage:[71] Ireland (a.), Cyprus (b.), and Malta (c.). In addition, two other jurisdictions will be considered in light of the specific enforcement mechanisms they have developed for non-EU money judgments: the Netherlands (d.) and Sweden (e.).

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[66] *H Limited*, *supra* n 31, paras. 36–38.
[67] *H Limited*, *supra* n 31, para. 26. See also Lazić and Mankowski, *supra* n 3, para. 1.182.
[68] *H Limited*, *supra* n 31, para. 32.
[69] *Arab Jordan Investment Bank*, *supra* n 32, para. 14.
[70] See also v Calster, *supra* n 5, para. 2.601.
[71] On the availability of actions upon the judgment debt in common-law countries, see also Commonwealth Secretariat, "Commonwealth practice in the recognition of foreign judgments" (2009) 35 Commonwealth Law Bulletin 345, paras. 9 et seq.

1. Ireland

The Republic of Ireland arguably provides the strongest counter-argument to any hope that the decision in *H Limited* might have already lost its practical importance with Brexit.[72] Irish courts have not only long followed the doctrine of obligation;[73] the High Court of Ireland also famously confirmed in *Bussoleno v Kelly* that regarding the 'well-established common law rules on the enforcement and recognition of foreign judgments', there was no relevant difference between English and Irish law.[74] Indeed, just like in English law, foreign money judgments[75] can be enforced in Ireland through an action upon the judgment debt, with the only elements for the court to verify being international jurisdiction of the foreign court, whether the foreign judgment was final and conclusive, and whether the judgment debtor had any defence to recognition (such as irreconciliability with Irish public policy).[76]

There should also not be much doubt that such enforcement proceedings fulfil the requirements of *H Limited* with regard to their adversarial nature.[77] Again, just like in English law, the judgment creditor may seek a summary judgment;[78] but if the judgment debtor establishes an arguable defence to recognition and enforcement (eg that the foreign judgment is not final and conclusive),[79] the case proceedings will be adjourned to plenary hearing.

2. Cyprus

The situation is similar in Cyprus, where English Common Law applies unless there is specific Cypriot legislation in place.[80] Except for judgments governed by European law or international treaties,[81] no such legislation exists for foreign judgments.[82] Indeed, the Supreme Court held in 2005:

> '[I]t appears from the various authorities to which we have referred, that when a foreign judgment is not registrable, then under common law the beneficiary of the foreign judgment can file an action based on the foreign judgment as a cause of action.'[83]

Just as in English (and Irish) law, the action will succeed if the foreign court had international jurisdiction (under Cypriot law), if the foreign judgment was final and conclusive, and unless

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[72] For this view, see Krümmel, *supra* n 47, 189.

[73] See *Rainford v Newell Roberts* [1962] IR 95, 104; *Flightlease (Ireland) Ltd v Companies Act Judgment* [2006] IEHC 193, para. 5.18; W Binchy, *Irish Conflicts of Law* (Butterworth, 1988) 586. See also above, at fn. 17.

[74] *Bussoleno Ltd v Kelly and ors* [2011] IEHC 220, paras. 12–13. See also H Biehler, D McGrath and E McGrath, *Delany and McGrath on Civil Procedure* (Thomson Reuters, 4th edn, 2018), paras. 26-09, 26-18.

[75] Like in English law, non-money judgments require a new action based on the original obligation, although elements of the foreign judgment may be recognized as *res iudicata*: see Binchy, *supra* n 73, 603.

[76] Biehler, McGrath and McGrath, *supra* n 74, paras. 26-08, 26-20 et seq.; Binchy, *supra* n 73, 601. See also *Bussoleno Ltd v Kelly and ors* [2011] IEHC 220, para. 13.

[77] Above, under C.2.

[78] Biehler, McGrath and McGrath, *supra* n 74, para. 26-23.

[79] As was the case in *Bussoleno Ltd v Kelly and ors* [2011] IEHC 220: see para. 52.

[80] A Neocleous and S Pittas, "Enforcement of Foreign Judgments and Arbitration Awards" in D Campbell (ed), *Neocleous's Introduction to Cyprus Law* (Yorkhill Law, 2000), para. 5-1. See also Commonwealth Secretariat, *supra* n 71, para. 9.

[81] Including the Foreign Judgments (Reciprocal Enforcement) Law of 1935, Cap 10.

[82] A Neocleous and S Pittas, *supra* n 80, para. 5-1.

[83] Κωνσταντίνου Αχιλλέας και Άλλοι ν. Εκδοτικής Εταιρείας Δημόκριτος Λτδ. και Άλλου (1996) 1 ΑΑΔ 206 (*Constantinou Achilleas and ors v Dimokritos Publications Company Ltd and anor* (1996) 1 CLR 206, translation by Nicolas Kyriakides and Konstantinos Rokas.

the defendant has a defence to recognition (such as irreconciability with public policy);[84] but there is no review of the substance of the foreign decision.

Again, the judgment creditor may apply for summary judgment on the ground that the defendant has no arguable defence to recognition and enforcement.[85]

Importantly, though, Cypriot courts have so far only enforced judgments under common law against judgments debtors residing in Cyprus. As this requirement has just been confirmed, albeit *obiter*, by the Supreme Court in *VTB Bank v Taruta*,[86] it seems unlikely that a confirmation judgment can be obtained from Cyprus against non-residents, even if they have assets there.[87]

3. Malta

Surprisingly, things are different in Malta. Despite its common-law heritage, Maltese law actually offers an avenue for enforcement of Non-EU decisions[88] that can fairly be described as exequatur. Pursuant to Art. 826 of the Maltese Code of Organization and Civil Procedure (COCP),[89]

> ‘any judgment delivered by a competent court outside Malta and constituting a *res judicata* may be enforced by the competent court in Malta, in the same manner as judgments delivered in Malta, upon an application containing a demand that the enforcement of such judgment be ordered.’

While Maltese law gives the defendant access to an unusually long list of defences under Arts. 827(1) and 811 COCP, including ‘a wrong application of the law’, the resulting decision will order enforcement of the foreign judgment, not payment of the original obligation.[90] Accordingly, as argued above,[91] it should not be considered to fall under the decision in *H Limited*.

It should not matter, then, that a Maltese enforcement decision would easily clear the threshold of adversariality: after the application by the judgment creditor under Art. 826 COCP, both parties have the right to make written or oral submissions.[92]

4. The Netherlands

The first Member State squarely outside of the realm of the English common law that deserves consideration is the Netherlands. Traditionally, foreign judgments cannot be enforced in the Netherlands pursuant to Art. 431(1) of the Dutch Code of Civil Procedure (CCP; *Wetboek van Burgerlijke Rechtsvordering*) absent international conventions. Instead,

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[84] Neocleous and Pittas, *supra* n 80, paras. 5-1, 5-20–25.
[85] Under Order 18 of the Cyprus Civil Procedure Rules. See also Neocleous and Pittas, *supra* n 80, paras. 5-3, 5-5–7; E Christofi and T Symeonides, *Enforcement of Judgments. Cyprus* (Chambers, 2020), 8.
[86] *VTB Bank (Open Joint-Stock Company) v Taruta Sergey Alekseyevich*, 12 June 2020, General Application 378/14.
[87] See also Christofi and Symeonides, *supra* n 85, 7.
[88] With the exception of UK decisions, which are governed by the British Judgments (Reciprocal Enforcement) Act, Chapter 52 of the Laws of Malta: see also E Brincat, “The British Judgments (Reciprocal Enforcement) Act”, *GHSL Online Law Journal*, 13 Sept 2019, ghsl.org/lawjournal/the-british-judgments-reciprocal-enforcement-act-chapter-52-of-the-laws-of-malta/.
[89] Chapter 12 of the Laws of Malta.
[90] See also A Cremona and LC Pullicino, “Malta”, in: Global Legal Group (ed), *The International Comparative Legal Guide to: Enforcement of Foreign Judgments 2019* (4th edn 2019), 138.
[91] Under C.1.
[92] A Cremona and LC Pullicino, *supra* n 90, 138.

the judgment creditor needs to seek a new decision on the merits pursuant to Art. 431(2) CCP. It is this provision which has allowed the Dutch Supreme Court (*Hoge Raad*) to develop an enforcement mechanism that is sometimes referred to as 'disguised exequatur' (*verkapte exequatur*)[93] but more closely resembles the common law method.

As early as 1924, the *Hoge Raad* has held that Dutch courts had discretion as to whether or not they would recognize foreign judgments, provided that certain minimum requirements (mainly regarding the jurisdiction of the court of origin)[94] were met.[95] In 2014, the Court held in its seminal *Gazprombank* decision[96] that such recognition could be used by the judgment creditor in the context of the new claim they had to bring in the Dutch courts under Art. 431(2) CCP: if the requirements for recognition – jurisdiction of the court of origin; due process; no violation of Dutch public policy; no conflict with another judgment – were met and if the judgment was enforceable in the state of origin, the claimant could seek a new (Dutch) judgment with the same content and for the same remedy as the foreign one, without any review of the merits of the creditor's original claim.[97]

Unsurprisingly, Dutch scholars have been quick to note the similarity to common-law enforcement and the potential application of the CJEU's decision in *H Limited* to the resulting Dutch judgments.[98]

Again, the requirement of adversarial proceedings established in *H Limited* should hardly be an obstacle: as enforcement through Art. 431(2) CCP along the lines established by the *Hoge Raad* requires new proceedings on the merits that are governed by the general rules of civil procedure, the defendant, after having been served the writ of summons, will be invited to submit a statement of defence, which will usually be followed by an ordinary hearing in court.[99]

5. Sweden

The situation is remarkably similar in Sweden, albeit within a more limited scope. Chapter 3 Section 2 of the Swedish Enforcement Code (*utsökningsbalken*) requires special provisions for both recognition and enforcement of foreign judgments, which have only been enacted for judgments falling under EU law or international treaties. For all other decisions, the judgment creditor has no choice but to bring new proceedings in Sweden.

Yet, just like in the Netherlands, the Swedish Supreme Court has stepped in to alleviate the claimant's burden in certain cases: according to two landmark decisions from 1949[100] and 1973,[101] respectively, the *Högsta domstolen* held that a judgment rendered under an exclusive

[93] See Lazić and Mankowski, *supra* n 3, para. 1.182.
[94] Initially, only submission to the foreign court was deemed a strong enough basis for jurisdiction; but this has meanwhile been relaxed.
[95] Hoge Raad, 14 November 1924, [1925] *Nederlandse Jurisprudentie* 91.
[96] Hoge Raad, 26 September 2014, ECLI:NL:HR:2014:2838.
[97] See L Strikwerda and SJ Schaafsma, *Inleiding tot het Nederlandse Internationaal Privaatrecht* (12th edn, Wolters Kluwer, 2019), 412–413. As in other systems, this application does not prevent the judgment creditor from seeking a new decision on the merits if the claim based on the foreign judgment should fail.
[98] See Bens, *supra* n 42, 926–927; M Zilinksy, "Tenuitvoerlegging van derdelands rechterlijke beslissingen en de Verordening Brussel I-bis", [2022] Weekblad voor privaatrecht, notariaat en registratie 543 (No. 7379), 545–546; KJ Krzeminski, "Actio iudicati onder de Brussel I-bis Vo: een open deur of een geopend 'achterdeurtje'?" [2022] *Nederlands Internationaal Privaatrecht* 650. See also V Lazić and P Mankowski, *supra* n 3, para. 1.183.
[99] See in more detail M van Hooijdonk and P Eijsvoogel, *Litigation in the Netherlands. Civil Procedure, Arbitration and Administrative Litigation* (2nd edn, Wolters Kluwer 2012), 43–45.
[100] Högsta domstolen, 1 December 1949, [1949] Nytt juridiskt arkiv 724.
[101] Högsta domstolen, 12 December 1973, [1973] Nytt juridiskt arkiv 628.

jurisdiction agreement in the *forum prorogatum* could be used as the basis for a new Swedish decision, with the judgment debtor only being able to challenge the foreign decision for a violation of due process or Swedish public policy. While case law has remained scarce and this approach has never been extended to other grounds of international jurisdiction, it seems at least arguable that this way of enforcing non-EU judgments comes close to the common-law method.

Again, just like in the Netherlands, the fact that this form of enforcement is a creature of case law means that the general rules of civil procedure apply. Accordingly, the resulting judgment should 'have been, or have been capable of being, the subject of an inquiry in adversarial proceedings' at least to the extent of the English confirmation judgment in *H Limited*.

As a final point, it should be noted that – almost as a counterweight to the uniquely restrictive approach to foreign judgments – international jurisdiction against non-EU defendants is particularly easy to find in Sweden, including for the aforementioned type of proceedings: all that is required is 'a Swedish interest in the administration of justice' (*rättsskipningsintresse*).[102]

E. Conclusion

For the reasons given above, the Court of Justice's unfortunate decision in *H Limited* should not be understood so broadly as to apply to *any* decision by which the courts of an EU Member State allow for the enforcement of a non-EU judgment: instead, it must be limited to cases in which the court of a Member State renders a new decision on the merits based on the debt created by the foreign decision and exclude cases in which the court merely declares the foreign decision enforceable through exequatur proceedings.

Still, this paper has shown that this leaves at least four jurisdictions in which the debt resulting from a non-EU judgment is enforced through a new domestic judgment without a review of the merits: Ireland, Cyprus, the Netherlands, and Sweden. Enforcement decisions from those Member States seem to fall squarely within the scope of *H Limited* and, consequently, under Chapter III of the Brussels Ia Regulation. As has also been shown, the additional requirement of the judgment having been (capable of being) 'the subject of an inquiry in adversarial proceedings' does not provide a significant obstacle as enforcement proceedings in the relevant Member States tend to be governed by the general rules of civil procedure and offer similar procedural safeguards to an English confirmation judgment.

Thus, despite the narrow reading of *H Limited* advocated here, it would be widely inaccurate to consider the backdoor into the European Area of Justice that the decision has opened to have closed with Brexit. Instead, judgment creditors may still find numerous options to create an EU judgment through enforcement proceedings in strategically selected Member States.

The biggest obstacle to this tactic might be the need to find international jurisdiction for these enforcement proceedings. But given the diversity of approaches to this question (including the liberal approach of Swedish courts) and the growing attractiveness as a place of corporation of Ireland in particular, this obstacle can certainly be overcome in appropriate cases.

[102] See eg Högsta domstolen, 15 July 2016, [2016] Nytt juridiskt arkiv 779, para. 2; see also in more detail L Lundstedt, "Sweden", in T Lutzi, E Piovesani, and D Zgrabljić Rotar, *supra* n 3, 237 et seq; E Sinander, "Svenskt rättsskipningsintresse" [2019] Svensk juristtidning 932 et seq.

The most promising backdoors into the European Area of Justice may still have to be found by crafty judgment creditors and their law firms – but there should be no doubt that their number has noticeably increased with the CJEU's unfortunate decision in *H Limited*.