Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 16 December 2021 [1]

**Case C-568/20**

**J**
**v**
**H Limited**

(Request for a preliminary ruling
from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Enforcement of judgments in civil and commercial matters – Regulation (EU) No 1215/2012 – Substantive scope – Judgments given in a Member State – Certificate attesting to the enforceability of the judgment – Grounds for refusal of enforcement – Breach of public policy of the Member State addressed – Infringement of a rule of EU law – Grounds for refusal of enforcement under the law of the Member State addressed)

1. Following issuance by the court of the Member State of origin of the certificate provided for in Article 53 of Regulation (EU) No 1215/2012, [2] attesting to the enforceability of the judgment given and the applicability of that regulation, may the court of the Member State addressed, to which an application for refusal of enforcement of that judgment had been made by the person against whom enforcement is sought, allow that application on the grounds of an erroneous appraisal of the applicability of that regulation, in so far as the purpose of the proceedings before the court of the Member State of origin was to declare enforceable judgments given in a third State? That is the question that the Court must answer in the present case.

## I. Legal context

2. Articles 2, 39, 41, 42, 45, 46, 52 and 53 of Regulation No 1215/2012 are relevant in the present case.

[1] Original language: French.

[2] Regulation 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).

## II. The facts giving rise to the dispute, the main proceedings and the question referred for a preliminary ruling

3. As a result of an action brought by H Limited, a banking institution, based on two judgments given in Jordan during 2013 ordering J, a borrower, to pay the debit balance on two loans, the High Court of Justice (England & Wales), Queen's Bench Division ('the High Court of Justice') issued an order on 20 March 2019 in summary proceedings stating that J must pay H Limited the sum of 10 392 463 United States Dollars (USD), plus USD 5 422 031.65 in interest and 125 000 Great British Pounds (GBP) in costs. That court also drew up and issued the certificate referred to in Article 53 of Regulation No 1215/2012 ('the certificate').

4. H Limited brought proceedings to enforce that order in Austria, the legal domicile of J, who lodged an application for refusal of enforcement under Articles 45 and 46 of Regulation No 1215/2012. In support of that application, J cited an infringement of Austrian public policy [3] and asserted that that order for enforcement of judgments given in a third State did not constitute an enforceable judgment within the meaning of Regulation No 1215/2012. He argued that, in proceedings for refusal of enforcement, the court of the Member State in which recognition is sought ('the court addressed') is not bound by the certificate issued by the court of the Member State of origin ('the court of origin').

5. In the proceedings at first instance, the Bezirksgericht Freistadt (District Court, Freistadt, Austria) issued an order of 9 October 2019 authorising H Limited to enforce the order of 20 March 2019 issued by the High Court of Justice. In its capacity as an appeal court, the Landesgericht Linz (Regional Court, Linz, Austria) dismissed J's action by decision of 22 June 2020.

6. Following an extraordinary appeal on a point of law brought by J against the decision of the appeal court, the Oberster Gerichtshof (Supreme Court, Austria) decided, by order of 23 September 2020, to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are the provisions of [Regulation No 1215/2012], in particular Article 2(a) and Article 39, to be interpreted as meaning that a judgment that is to be enforced exists even if, in a Member State, the judgment debtor is obliged, after summary examination in adversarial proceedings, albeit relating only to the binding nature of the force of *res judicata* of a judgment given against him in a third State, to pay to the party who was successful in the third State proceedings the debt that was judicially recognised in the third State, when the subject matter of the proceedings in the Member State was limited to examination of the existence of a claim derived from the judicially recognised debt against the judgment debtor?

(2) If question 1 is answered in the negative:

Are the provisions of Regulation No 1215/2012, in particular Articles 1, 2(a), 39, 45, 46 and 52, to be interpreted as meaning that, irrespective of the existence of one of the grounds set out in Article 45 of Regulation No 1215/2012, enforcement must be refused if the judgment under review is not a judgment within the meaning of Article 2(a) or Article 39 of Regulation No 1215/2012 or the application in the Member State of origin on which the judgment is based does not fall within the scope of Regulation No 1215/2012?

[3] Paragraph 18 of the request for a preliminary ruling.

(3) If the first question is answered in the negative and the second question in the affirmative:

Are the provisions of Regulation No 1215/2012, in particular Articles 1, 2(a), 39, 42(1)(b), 46 and 53, to be interpreted as meaning that, in proceedings concerning an application for refusal of enforcement, the court of the Member State addressed is compelled to assume, on the basis solely of the information provided by the court of origin in the certificate issued pursuant to Article 53 of Regulation No 1215/2012, that a judgment that falls within the scope of the regulation and is to be enforced exists?'

## III. Procedure before the Court

7. The claimant and the defendant in the main proceedings, the German Government and the European Commission submitted written observations.

## IV. Analysis

### A. The scope of the request for a preliminary ruling

8. While the order for reference contains three formally separate questions referred for a preliminary ruling, these are, in my view, closely linked and relate to the same legal issue, namely the conditions under which the court addressed may grant an application for refusal of enforcement of a judgment of the court of origin on the grounds that Regulation No 1215/2012 does not apply even though that second court has issued a certificate attesting to its enforceability.

9. I therefore propose to the Court that these three questions be examined together, reformulated as follows:

'Are the provisions of Regulation No 1215/2012 to be interpreted as allowing the court of the Member State addressed, to which an application for refusal of enforcement has been made under Article 46 of that regulation, to find, contrary to the determination made by the court of the Member State of origin and demonstrated by the issuance of the certificate provided for in Article 53 of that regulation, that Regulation No 1215/2012 is inapplicable on the grounds that the purpose of the proceedings before that latter court was to declare enforceable judgments given in civil and commercial matters in a third State and, consequently, to refuse enforcement of the judgment given by that court?'

10. This question requires an assessment as to whether an enforceable judgment exists in the present case, and hence a determination of the scope of the certificate, and then an assessment of the prerogatives of the court addressed to which an application for refusal of enforcement of that judgment has been made, as determined by Regulation No 1215/2012.

### B. The existence of an enforceable judgment within the meaning of Regulation No 1215/2012

11. In terms of the recognition and enforcement of judgments in civil and commercial matters within the European judicial area, the major innovation of the system established by Regulation No 1215/2012 relates without question to the abolition of the exequatur. Article 39 of that

regulation provides that any 'judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required'. That provision must be read in the light of recital 26 of the regulation, which states that any judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.

12. The certificate issued by the court of origin plays a crucial role within this new system of direct enforcement of judgments. Indeed, it is apparent from the combined provisions of Articles 37 and 42 of Regulation No 1215/2012 that, for the purposes of the recognition and enforcement in a Member State of a judgment given in another Member State, the applicant must produce only a copy of the judgment concerned accompanied by that certificate. In accordance with Article 42(1)(b) of that regulation, the certificate attests that the abovementioned judgment is enforceable and contains an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest. It is to be served on the person against whom enforcement is sought prior to any enforcement measure, in accordance with Article 43(1) of that regulation. [4] In that context, and at the invitation of Advocate General Bot, [5] that certificate has been described by the Court as the basis for implementation of the principle of direct enforcement of judgments given in the Member States, meaning that the judgment in question is capable of circulating freely within the European judicial area. [6]

13. To obtain this certificate, the applicant must approach the court of origin, which is the court that has given the judgment of which the enforcement is sought, [7] which is most familiar with the dispute and which, as regards the substance, is most able to confirm that the judgment is enforceable. By issuing such a certificate at the end of a procedure that is judicial in nature, [8] the court of origin implicitly confirms that the judgment given which is to be recognised and enforced in another Member State falls within the scope of Regulation No 1215/2012, in view of the fact that the issue of the certificate is possible only on that condition. Thus, in a situation where the court which gave the judgment to be enforced did not rule, at the time of the judgment, on the applicability of Regulation No 1215/2012, that court is obliged, at the time of the issue of that certificate, to determine whether the dispute comes within the scope of that regulation. [9]

14. In the present case, it is common ground that the court of origin drew up and issued the certificate on the basis of its order of 20 March 2019, which therefore falls within the scope of Regulation No 1215/2012. Under these circumstances, there is indeed, a priori, an enforceable judgment given in a Member State [10] within the meaning of Article 2(a) and Article 39 of Regulation No 1215/2012 that comes within the system of direct enforcement laid down in that regulation, a factual reality that is binding upon the court addressed.

4 Judgment of 28 February 2019, *Gradbeništvo Korana* (C–579/17, EU:C:2019:162, paragraph 36).

5 Opinion in *Gradbeništvo Korana* (C–579/17, EU:C:2018:863, point 44).

6 Judgment of 28 February 2019, *Gradbeništvo Korana* (C–579/17, EU:C:2019:162, paragraphs 37 and 39).

7 Article 2(f) of Regulation No 1215/2012.

8 Judgment of 4 September 2019, *Salvoni* (C–347/18, EU:C:2019:661, paragraph 31).

9 Judgment of 28 February 2019, *Gradbeništvo Korana* (C–579/17, EU:C:2019:162, paragraphs 38 and 40).

10 Under 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 2019 C 384 I, p. 1), and given the date on which that agreement was adopted – namely 20 March 2019 – the order at issue given by an English court does not constitute a judgment of a third State.

15. The question raised in the request for a preliminary ruling is, in actual fact, that of the conditions under which the court addressed may call into question such a situation on the grounds of an allegedly erroneous assessment by the court of origin as to whether Regulation No 1215/2012 applies, thus vitiating by irregularity the issuance of the certificate. It is clear from that request that the referring court considers that a review of this point may lead to enforcement being refused even if none of the grounds for refusal laid down in Article 45 of Regulation No 1215/2012 are found to apply.

## C. The possibility of a refusal of enforcement on the grounds of the inapplicability of Regulation No 1215/2012

16. The abovementioned question is to be resolved through an analysis of the legal regime governing refusal of enforcement established by Regulation No 1215/2012. To support the assertion that a review of the determinations as to the applicability of that regulation made by the court of origin is possible, the referring court and the German Government make reference to case-law of the Court relating to review of the certificate referred to in Article 54 of Regulation (EC) No 44/2001. [11]

### *1. The relevance of the case-law relating to review of the certificate referred to in Article 54 of Regulation No 44/2001*

17. It should be noted that Regulation No 44/2001 required that the party seeking enforcement first request that a declaration of enforceability be issued by the court or authority of the Member State addressed. That request had to be accompanied by a copy of the judgment concerned and, where applicable, by the certificate referred to in Article 54 of Regulation No 44/2001, with the requirement that those two documents be subject to purely formal checks, under recital 17 of that regulation. The Court has held that the authorities of the Member State addressed were required, at the beginning of the procedure, to do no more than ensure completion of those formalities with a view to issuing a declaration of enforceability for the judgment and, in the second stage of the procedure, to assess the merits of the dispute, where applicable, brought by the party against whom enforcement is sought against that declaration on the basis of the grounds for dispute set out in Articles 34 and 35 of Regulation No 44/2001. [12]

18. In this context, it has been stated that there is nothing that prohibits the court of the Member State addressed from verifying the accuracy of the factual information contained in the certificate. It is important to emphasise that this verification is justified by the fact that the author of that certificate is not necessarily the author of the original judgment, and that information can therefore only have prima facie value. This latter consideration also follows from the fact that production of the certificate is not obligatory, since the court in the Member State addressed, which has jurisdiction to issue the declaration of enforceability, may accept an equivalent document. [13]

19. Quite apart from the very limited scope of the review described, that case-law cannot be applied *mutatis mutandis* to the present case, much less extrapolated, given that the new recognition and enforcement system created by Regulation No 1215/2012 is significantly

[11] Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

[12] Judgment of 6 September 2012, *Trade Agency* (C–619/10, EU:C:2012:531, paragraphs 28 to 31).

[13] Judgment of 6 September 2012, *Trade Agency* (C–619/10, EU:C:2012:531, paragraphs 35 and 36).

different from its predecessor. Regulation No 1215/2012 thus abolished the stage prior to enforcement in the Member State addressed involving the declaration of enforceability, made it mandatory to provide a certificate of enforceability of the judgment, entrusted only the court of origin – which has the best knowledge of the dispute – with the task of drawing up that certificate, and does not include any recitals equivalent to recital 17 of Regulation No 44/2001.

20. Somewhat radically, the Court stated in paragraph 35 of the judgment in *Weil*[14] that the enforcement procedure under Regulation No 44/2001 precludes, 'like enforcement under Regulation No 1215/2012, any subsequent review on the part of a court of the Member State addressed of whether the action giving rise to the judgment for which enforcement is sought falls within the scope of Regulation No 44/2001, the grounds for challenging the declaration that a judgment is enforceable being exhaustively laid down by that regulation'.

21. The wording of that paragraph raises serious questions which seem to me to exclude its consideration in the present case. I note that the paragraph in question addresses an issue that was not directly raised by the question referred for a preliminary ruling, namely the interpretation of Article 54 of Regulation No 44/2001 for the purposes of determining whether a review is carried out by the competent authority as to the applicability of that regulation before the certificate provided for in that provision is issued. The statement contained therein seems to me to constitute an additional basis for a solution already supported by paragraph 33 of the judgment in question.

22. In any event, Regulation No 1215/2012 was not applicable *ratione temporis* and a mere reference to that regulation, in a comparative assessment without any explanation, cannot be considered to be a valuable precedent such as to settle the debate on the scope of the jurisdiction of the court addressed, all the more so since the systems for the recognition and enforcement of judgments established by Regulations No 44/2001 and No 1215/2012 are significantly different.[15]

### *2. The grounds for refusal of enforcement laid down by Regulation No 1215/2012*

#### *(a) Preliminary observations*

23. I think it is necessary, as a preliminary step, to make a number of observations concerning the relatively complex legal regime for refusal of enforcement established by Regulation No 1215/2012.

24. First, it has been observed in the literature that, in the context of Regulation No 1215/2012, it is for the sentenced person to respond in order to seek a refusal of enforcement on the basis of one of the grounds permitted by that regulation and, if the person concerned does not respond, the judgment will not be reviewed at all,[16] a factor that has resulted in a 'fully privatised' system for review of judgments.[17] In the same vein, the Court has held that the system for recognition and

[14] Judgment of 6 June 2019, *Weil* (C–361/18, EU:C:2019:473).

[15] It is settled case-law that, in so far as Regulation No 1215/2012 repeals and replaces Regulation No 44/2001, the Court's interpretation of the provisions of the latter regulation also applies to Regulation No 1215/2012, but only when the provisions of these two instruments of EU law may be regarded as 'equivalent' (judgment of 28 February 2019, *Gradbeništvo Korana* (C–579/17, EU:C:2019:162, paragraph 45)), which is not the case here in respect of the provisions relating to the certificate.

[16] Ferrand, F., 'Reconnaissance et exécution des judgments européens en matière civile et commerciale', *Droit et pratique de la procédure civile Dalloz action*,. pp. 541-243.

[17] D'Avout, L., 'L'efficacité internationale des judgments après la refonte du règlement "Bruxelles I"', *Revue internationale de droit processuel*, Vol.5, No 2, 2015, p. 258.

enforcement of court decisions established by Regulation No 1215/2012 is based on the abolition of exequatur, which implies that no control is exercised by the competent court of the Member State addressed, since only the person against whom enforcement is sought can oppose the enforcement of the judgment affecting him or her.[18] It therefore appears that, before the application for refusal of enforcement and the procedure that this application triggers, governed by Section 3 of Chapter III of Regulation No 1215/2012, and a fortiori in the absence of such an application, the court addressed has no power of assessment as to the judgment and the certificate adopted by the court of origin.[19]

25. Secondly, it should be noted that the principle of mutual trust between the Member States, which is of fundamental importance in EU law, requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law. As is apparent from recital 26 of Regulation No 1215/2012, the system of recognition and enforcement laid down by that regulation is based, precisely, on mutual trust in the administration of justice in the European Union. Such trust requires, inter alia, that judicial decisions given in one Member State should be recognised and enforced automatically in another Member State. In that system, the provisions of Regulation No 1215/2012, which provide an exhaustive list[20] of the grounds on which the recognition or enforcement of a judgment may be opposed, must be interpreted strictly, inasmuch as they constitute an obstacle to the attainment of one of the fundamental objectives of that regulation.[21]

26. The five grounds for refusal cover (i) where recognition is manifestly contrary to public policy in the Member State addressed; (ii) failure to serve the document instituting the proceedings in sufficient time where the judgment was given in default of appearance; (iii) inability to reconcile the judgment with a judgment given between the same parties in the Member State addressed; (iv) inability to reconcile the judgment with an earlier judgment given in another Member State; and (v) disregard of certain rules of jurisdiction by the court of the Member State of origin. This exhaustive list does not mention the applicability of Regulation No 1215/2012 or a breach of Article 2(a) and Article 39 of that regulation requiring that the judgment of which enforcement is sought be given in a Member State.

27. Thirdly, we can see from Regulation No 1215/2012 that the European legislature provided for the coexistence of two types of grounds for refusal of enforcement, namely those referred to generically in Article 41(2) of that regulation as 'the grounds for refusal … of enforcement under the law of the Member State addressed', on the one hand, and those specifically listed in Article 45 of that regulation, which should be read in conjunction with Article 46 of that regulation, on the other hand. These grounds are linked by the need for the former to be compatible with the latter. In view of the relationship thus imposed by the legislature, it seems appropriate to me to examine

[18] See, to that effect, judgment of 28 February 2019, *Gradbeništvo Korana* (C–579/17, EU:C:2019:162, paragraph 36). The second use of the term 'recognition' in paragraph 36 of that judgment does not seem correct to me and the wording has not been reproduced, to the extent that refusal of recognition of a judgment may be requested by any interested party in accordance with Article 45 of Regulation No 1215/2012.

[19] The question arises as to whether the Court's case-law does not imply that the court addressed has circumscribed powers, since it can only examine grounds for refusal of enforcement put forward by the applicant, to the exclusion of any raised of its own motion. However, I should note that, according to Article 47(2) of Regulation No 1215/2012, to the extent that the procedure for refusal of enforcement is not governed by that regulation, it is covered by the law of the Member State addressed. Once an application for refusal of enforcement has been referred to it and the proceedings on the action commenced, the prerogatives of the court addressed, and more specifically the possibility or obligation of examining of its own motion a ground for refusal of enforcement, are therefore determined by the procedural rules of that State.

[20] Judgments of 6 September 2012, *Trade Agency* (C–619/10, EU:C:2012:531, paragraph 31), and of 23 October 2014, *flyLAL-Lithuanian Airlines* (C–302/13, EU:C:2014:2319, paragraph 46).

[21] See, by analogy, judgment of 16 July 2015, *Diageo Brands* (C–681/13, EU:C:2015:471, paragraphs 40 and 41).

first the grounds for refusal of enforcement resulting from the combined provisions of Articles 45 and 46 of that regulation and, more specifically, the ground that recognition is contrary to public policy in the Member State addressed, which is relevant in the present case and was invoked by J. [22]

### *(b) The ground for refusal of enforcement laid down in Article 45 of Regulation No 1215/2012 based on recognition being contrary to public policy in the Member State addressed*

28. With regard to the concept of 'public policy' referred to in Article 45(1) of Regulation No 1215/2012, as has already been mentioned, that concept must be interpreted strictly as it constitutes an obstacle to the attainment of one of the fundamental objectives of that regulation and should be relied upon only in exceptional cases. While the Member States remain in principle free, by virtue of the proviso in that provision, to determine, according to their own national conceptions, what the requirements of their public policy are, the limits of that concept are a matter of interpretation of that regulation. Consequently, while it is not for the Court to define the content of the 'public policy' of a Member State, it is nonetheless required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from another Member State. [23]

29. In that connection, it must be observed that, by not allowing any review of a foreign judgment as to its substance, Article 52 of Regulation No 1215/2012 prohibits the court of the Member State addressed from refusing to recognise or enforce that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the Member State of origin and that which would have been applied by the court of the Member State addressed had the dispute been brought before it. Similarly, the court of the Member State addressed may not review the accuracy of the findings of law or fact made by the court of the Member State of origin. Consequently, recourse to a public policy objection can be envisaged only where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the Member State addressed inasmuch as it would infringe a fundamental principle. In order for the prohibition of any review of the substance of a foreign judgment to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the Member State addressed or of a right recognised as being fundamental within that legal order. [24]

30. It is on the basis of those considerations that we need to examine whether the matters indicated by the referring court are such as to establish that the enforcement of the order of 20 March 2019 issued by the High Court of Justice constitutes a manifest breach of public policy in Austria, within the meaning of Article 45(1) of Regulation No 1215/2012. Those matters concern the breach, by the indivisible legal whole constituted by that judgment and the accompanying certificate, of a rule of substantive law, namely the manifestly erroneous application of Article 2(a) and Article 39 of that regulation requiring that the judgment of which enforcement is sought must be given in a Member State and thereby determining the scope *ratione materiae* of that regulation with regard to the judgments concerned.

[22] See paragraph 18 of the decision for reference.

[23] See, by analogy, judgment of 25 May 2016, *Meroni* (C–559/14, EU:C:2016:349, paragraphs 38 to 40).

[24] See, by analogy, judgment of 25 May 2016, *Meroni* (C–559/14, EU:C:2016:349, paragraphs 41 and 42).

31. The Court has previously had to address a situation in which there was an alleged manifest breach of a rule of EU law and allowed a review as to the existence of such a breach, taking into account the incorporation of EU law into the legal order of the Member States and the task of the national courts, as the courts of the EU under ordinary law, of ensuring the effective application of the rules of EU law. The Court has therefore held that the public order clause would apply only where the error of law in question means that recognition – or enforcement in the present case – would result in the manifest breach of an essential rule of law in the EU legal order and therefore in the legal order of that Member State. [25]

*(1) The manifest breach of a rule of EU law*

32. Relying on the language of the Court's judgment in *Owens Bank*, [26] the referring court considers that Regulation No 1215/2012 cannot apply to a judgment of the court of origin following an action seeking to enforce judgments given in a non-contracting State (*actio judicati*) and based on a summary review consisting in verifying whether those judgments did indeed oblige the borrower to pay the lending bank a certain sum, without the legal relationship underlying the debt recognised by those judgments being examined on the merits. In that judgment, the Court held that the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, [27] as amended, does not apply to proceedings or issues arising in proceedings in contracting States concerning the recognition and enforcement of judgments in civil and commercial matters in non-contracting States. It seems to me that that solution should be transposed to the present case.

33. First, it should be noted that it follows from the very wording of Article 2(a) and Article 39 of Regulation No 1215/2012 that the procedures envisaged by Chapter III of that regulation, concerning recognition and enforcement, apply only in the case of judgments given by the courts of a Member State. So it is clear, with regard to the rules of jurisdiction, that the provisions of Chapter II of Regulation No 1215/2012, adopted on the basis of Article 81 TFEU as being necessary for the proper functioning of the internal market, lay down no rules determining the forum for proceedings for the recognition and enforcement of judgments given in non-contracting States. [28]

34. It is then necessary to examine the subject of the proceedings before the court of origin to determine whether they were intended to create conditions enabling the enforcement of a judgment given in a civil and commercial matter in a non-contracting State. [29] On this point, the information provided by the referring court and described above justify, in my view, a positive response. [30]

35. While the defendant in the main proceedings has expressed disagreement with the referring court's presentation of the original proceedings, it clearly recognises that this is an action, governed by special common law rules of procedure, based on final judgments of third States and

[25] Judgment of 16 July 2015, in *Diageo Brands* (C–681/13, EU:C:2015:471, paragraphs 48 and 50).

[26] Judgment of 20 January 1994, in *Owens Bank* (C–129/92, EU:C:1994:13).

[27] OJ 1972 L 299, p. 32.

[28] See, to that effect, judgment of 20 January 1994, *Owens Bank* (C–129/92, EU:C:1994:13, paragraphs 17 and 23).

[29] See, to that effect, judgment of 20 January 1994, *Owens Bank* (C–129/92, EU:C:1994:13, paragraph 13).

[30] In paragraph 10 of its observations, the Commission stated that the order by the court of origin had been issued following summary proceedings concerning the enforcement of two judgments obtained in Jordan. The Commission also stated, in paragraph 36 of those observations, that the purpose of the proceedings conducted by that court was limited to examining whether there was an obligation to pay based on a final judgment in respect of the party seeking enforcement.

allowing summary judgment to be given at the end of incomplete proceedings, in so far as the defence has no real chance of success.[31] Quite apart from the references to the Court's case-law on the very concept of 'judgment', in terms of its substance, the considerations whereby the original proceedings were adversarial and the court of origin examined the objections made by the debtor (lack of standing to bring proceedings, judgments obtained fraudulently, absence of a power of attorney for the lender institution and claim for set-off of debts) have no relevance in terms of assessing the purpose of the proceedings.[32] The claim by the lender institution that the Jordanian judgments were not enforceable in the United Kingdom and in Austria only reinforces, in my view, the conclusion that the proceedings before the court of origin were indeed intended to create the conditions for the enforcement of those judgments in the United Kingdom.

36. On that basis, the judgment of the court of origin and the accompanying certificate – an indivisible legal whole – represent a manifest breach of Article 2(a) and Article 39 of Regulation No 1215/2012. It remains to be seen whether those rules are essential as required by the case-law of the Court.

*(2) The essential nature of the rule of law at issue*

37. I note that, unlike the judgment in *Diageo Brands*, the error committed by the court of origin relates not to a provision of substantive law that is part of a directive seeking to achieve minimal harmonisation whose purpose is in part to approximate the different trade mark laws of the Member States,[33] but, rather, to the provisions of a regulation. In that regard, recital 6 of Regulation No 1215/2012 states that in order to attain the objective of free circulation of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a legal instrument of the Union which is binding and directly applicable.

38. Regulation No 1215/2012, the legal basis of which is Article 67(4) TFEU aimed at facilitating access to justice, in particular through the principle of mutual recognition of judicial decisions, thus seeks, in the field of cooperation in civil and commercial matters, to strengthen the simplified and efficient system for rules of conflict, recognition and enforcement of judicial decisions, a system established by the legal instruments of which that regulation forms a continuation, in order to facilitate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union to become an area of freedom, security and justice, founded on the high level of confidence which should exist between the Member States.[34] Article 2(a) and Article 39 of Regulation No 1215/2012 determining the scope of that regulation in

[31] See paragraphs 16, 25 and 27 of the observations of H Limited, which adds (paragraph 20) that checks on public policy, the right to be heard when the proceedings are initiated and the indirect jurisdiction of the foreign courts are provided for by the common law procedure in question, which supports the conclusion that it is similar to an exequatur procedure. This information corresponds to the analysis of the common law recognition and enforcement procedures in the United Kingdom contained in the report by Professor Schlosser on the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59, p. 71, paragraphs 6 et seq.).

[32] Those objections correspond to ancillary issues that are inseparable from the enforcement proceedings of which they form part. I note that the Court held, in the judgment of 20 January 1994, *Owens Bank* (C–129/92, EU:C:1994:13, paragraphs 29 to 37), that the Brussels Convention does not apply to proceedings, 'or issues arising in proceedings', in contracting States concerning the recognition and enforcement of judgments given in civil and commercial matters in non-contracting States.

[33] Judgment of 16 July 2015, *Diageo Brands* (C–681/13, EU:C:2015:471, paragraph 51).

[34] Judgment of 9 March 2017, *Pula Parking* (C–551/15, EU:C:2017:193, paragraph 53).

respect of the judgments concerned must, in my view, be considered essential in so far as compliance with those provisions is crucial for the accomplishment of the objective of the European Union indicated above. [35]

39. I note that the concept of 'public policy' within the meaning of Article 45(1) of that regulation seeks to protect legal interests which are expressed through a rule of law. In the present case, these are the maintenance and development of a European area of freedom, security and justice promoting the free movement of judicial decisions necessary for the proper functioning of the internal market. [36] The implementation of a regime for the enforcement of judgments designed to ensure the proper functioning of the Union and its internal market cannot result, because of an original defect in application, in a Member State being obliged to enforce a judgment given in a third State, even though the exequatur conditions of that State, where applicable, are not met in the light of the international public policy of the Member State addressed, thus giving this defect its full effect.

40. The solution proposed [37] does not seem to me to run counter to the regime established by Regulation No 1215/2012. First, while it is indisputable that Regulation No 1215/2012 is based on a principle of direct enforcement of judgments, motivated by the desire of the European legislature to reduce the duration and costs of cross-border litigation, that regulation has nonetheless provided for the maintenance [38] and, to a certain extent, the reinforcement [39] of the review task assigned to the Member State addressed. Secondly, far from weakening the mutual trust of Member States in the field of justice, the 'safety valve' represented by a possible review of the applicability of Regulation No 1215/2012 in the context of an examination of the compatibility of the judgment with the public policy of the Member State addressed is likely to safeguard that mutual trust to a significant degree.

*(3) The requirement to exhaust all legal remedies in the Member State of origin*

41. Paragraph 64 of the judgment of 16 July 2015, *Diageo Brands* (C–681/13, EU:C:2015:471), according to which, save where specific circumstances make it too difficult or impossible to make use of the legal remedies in the Member State of origin, the individuals concerned are to avail themselves of all the legal remedies available in that Member State with a view to preventing a breach of public policy before it occurs, has been the subject of much debate as to its exact scope. Contrary to what has been argued, the above considerations cannot be analysed as a precondition

[35] See, by analogy, judgment of 1 June 1999, *Eco Swiss* (C–126/97, EU:C:1999:269, paragraph 36).

[36] See, to that effect, judgment of 23 October 2014, *flyLAL-Lithuanian Airlines* (C–302/13, EU:C:2014:2319, paragraph 56).

[37] The information contained in the order for reference could reveal an infringement of another essential rule of EU law, namely the principle of the prohibition of fraud and abuse of rights, which constitutes a general principle of EU law that must be observed by litigants. According to the Court, the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law (judgment of 28 October 2020, *Kreis Heinsberg* C–112/19, EU:C:2020:864, paragraph 46). Findings of fraud are to be based on a consistent body of evidence that satisfies both an objective and a subjective factor. In the present case, the objective factor is represented by the fact that the conditions for application of Regulation No 1215/2012 as to the judgments concerned are not met. The subjective factor is represented by H Limited's intent to circumvent or evade those conditions, by means of proceedings in a Member State with no apparent link to J that aim to create the conditions for enforcement of two Jordanian judgments with a view to obtaining the benefit attached to the application of that regulation, and thus direct enforcement of those judgments in Austria, where J is domiciled. This situation is similar to the concept of 'double exequatur'.

[38] It is important to note that the Commission's proposed regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM/2010/0748 final) included not only the abolition of exequatur but also the abolition of manifest breach of the public policy of the Member State addressed as grounds for non-enforcement of a judgment given in the Member State of origin. In view of the heated discussions on the second proposal and the reservations expressed by various Member States, the European legislature ultimately abandoned the proposal.

[39] See Article 41(2) of Regulation No 1215/2012 as to the possible application of grounds for refusal or of suspension of enforcement under the law of the Member State addressed.

for the examination of the ground based on breach of public policy. In this respect, we need only focus on the unequivocal wording of paragraph 68 of that judgment, which states that when determining 'whether there is a manifest breach of public policy in the State in which recognition is sought, the court of that State must take account of the fact that, save where specific circumstances make it too difficult, or impossible, to make use of the legal remedies in the Member State of origin, the individuals concerned must avail themselves of all the legal remedies available in that Member State with a view to preventing such a breach before it occurs'. The requirement to exhaust all legal remedies in the Member State of origin is only one factor used in the assessment of the ground for refusal based on recognition being contrary to public policy. [40]

42. The other question raised by the Court's case-law is that of its scope in terms of the public policy concerned, whether procedural and/or substantive. We should note that that judgment is based on two clearly distinct elements relating to a breach, on the one hand, of the substantive law at issue and, on the other, of procedural guarantees. However, the discussion on the exhaustion of remedies is exclusively concerned with the examination of this second element. The contribution of that same judgment has rightly been described as the generalised application of the requirement to verify the exercise of legal remedies in the Member State of origin, [41] which is already present in cases involving alleged breaches of the right to a fair trial and thus of procedural public policy. [42] I consider that the substantive international public policy of the Member State addressed expresses – more so today than its procedural counterpart – the essential values peculiar to that State translated into legal rules or principles that are not necessarily shared by the Member State of origin. It may therefore seem inappropriate to ask the court of the Member State of origin to play a role in defending those values and to make the issue dependent on the manifest nature of the breach of public policy in the Member State addressed.

43. However, in the case of an alleged infringement of a rule of EU law, this argument loses its relevance, [43] which implies, in my view, that the court addressed must verify that all legal remedies in the Member State of origin have been exhausted. In this respect, it would be appropriate to verify the reality of the particular circumstances making it too difficult or impossible to exercise those remedies, including against the decision issuing the certificate adopted at the end of a judicial procedure. I note that, referring to the initial proceedings in the Member State of origin, the Commission states in paragraph 29 of its observations that the application to allow the exceptional appeal lodged was rejected by the United Kingdom Court of Appeal.

### *3. The grounds for refusal of enforcement under Article 41(2) of Regulation No 1215/2012*

44. Because the referring court is questioning the possibility of refusing enforcement irrespective of whether one of the grounds referred to in Article 45 of Regulation No 1215/2012 applies, it is necessary to analyse Article 41(2) of that regulation, which states that 'notwithstanding

[40] This interpretation is confirmed by the judgment of 25 May 2016, *Meroni* (C–559/14, EU:C:2016:349, paragraphs 46 and 54). In paragraph 54 of that judgment, the Court clearly links the substantive finding of an absence of a manifest breach of the public policy of the Member State addressed to a possibility for the persons concerned to assert their rights before the court of the Member State of origin.

[41] Pailler, L., *Journal du droit international (Clunet)* No 4, 2016, pp. 20.

[42] See judgments of 2 April 2009, *Gambazzi* (C–394/07, EU:C:2009:219, paragraphs 42 to 45), and of 6 September 2012, *Trade Agency* (C–619/10, EU:C:2012:531, paragraph 61). In the judgment of 25 May 2016, *Meroni* (C–559/14, EU:C:2016:349), the requirement that all legal remedies must be exercised in the Member State of origin is also reviewed in the light of whether there is a clear conflict with procedural public policy.

[43] We should note here the incorporation of EU law into the legal order of the Member States and the task of the national courts, as the courts of the EU under ordinary law, of ensuring the effective application of the rules of EU law.

paragraph 1, the grounds for refusal or of suspension of enforcement under the law of the Member State addressed shall apply in so far as they are not incompatible with the grounds referred to in Article 45'. Let us be honest, the wording of that provision is not very precise and contains some ambiguity due to the use of the expression 'grounds for … refusal of enforcement', which refers to the wording of Articles 45 and 46 of Regulation No 1215/2012,[44] since the need to give Article 41(2) of that regulation actual effect clearly implies a failure to identify the grounds referred to in those various provisions.

45. Article 41 of Regulation No 1215/2012 falls under Section 2 of Chapter III covering enforcement, separate from the section on refusal of enforcement, and states that the procedure for the enforcement of judgments will be governed by the law of the Member State addressed. A judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed. This refers to the actual enforcement procedure that can be carried out directly by the beneficiary of the original judgment, following transmission to the competent enforcement authority of a copy of the judgment and the certificate, if no application for refusal of enforcement is made or such an application has been rejected by the court addressed.

46. It is in the light of that procedural framework that the content of the grounds for refusal of enforcement laid down in Article 41(2) of Regulation No 1215/2012 should be understood, a singularly delicate task because of the wide variety of national legislative provisions governing the implementation of enforcement measures and the challenges that may be brought against them. Examples may include challenges to the seizable nature of certain assets or sums of money, the quantum of the debt as a result of payments or set-off occurring after the judgment, irregularities that may affect the enforcement instruments, but also to the existence of the title itself due to the effects of a limitation period or to its enforceability.

47. It is important to emphasise that the implementation of non-harmonised grounds for refusal of enforcement under Article 41(2) of Regulation No 1215/2012 is doubly regulated, first, by the prohibition on substantive review of the judgment given in the Member State of origin under Article 52 of that regulation[45] and, secondly, by the requirement for compatibility with the harmonised grounds set out in Article 45 of that regulation in an exhaustive list, which does not include failure to have regard to the substantive scope of that regulation by the court of origin.[46]

48. We should remember that the existence of a ground for refusal of enforcement under Article 45 of that regulation results in a total 'neutralisation' of the judgment of the court of origin, which cannot have effect in the Member State addressed and therefore cannot be the subject of any enforcement measure. To comply with the exhaustive nature of the grounds listed in Article 45 of Regulation No 1215/2012 and the compatibility requirement mentioned above, a ground for refusing enforcement under Article 41(2) of that regulation should not be intended to call into question the acceptability of the enforcement order itself but could result in a possible limitation of its effects and thus a restriction on its enforcement.

[44] On the basis of recital 30 of Regulation No 1215/2012, the choice of that terminology can be explained by procedural considerations, namely the desire by the European legislature to see concentrated in a single procedure, brought at the request of the party against which enforcement is sought, the examination by the court addressed of all grounds making it possible to oppose enforcement, as listed in Article 41(2) and Article 45 of that regulation. It should be noted that, according to Article 47(2) of Regulation No 1215/2012, to the extent that the procedure for refusal of enforcement is not governed by that regulation, it is covered by the law of the Member State addressed.

[45] Article 52 of Regulation No 1215/2012 is in Section 4 of Chapter III, on common provisions.

[46] It should also be noted that, like the grounds listed in Article 45 of Regulation No 1215/2012, those listed in Article 41(2) of that regulation must be interpreted strictly.

49. In that context, it cannot be accepted that, in assessing a ground for refusal of enforcement referred to in Article 41(2) of Regulation No 1215/2012, the court addressed may review the regularity of the certificate and thus the applicability of that regulation to the action resulting in the judgment, which could lead that court to deprive the judgment concerned of its enforceability.

## V. Conclusions

50. In the light of the foregoing considerations, I propose to answer the questions referred by the Oberster Gerichtshof (Supreme Court, Austria) for a preliminary ruling as follows:

Articles 45 and 46 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 should be interpreted as meaning that the court of the Member State addressed, to which an application for refusal of enforcement is made, may grant that application on the grounds that the judgment and the certificate, provided for in Article 53 of that regulation, adopted by the court of the Member State of origin breach the public policy of the Member State addressed, where the error of law relied upon constitutes a manifest breach of a rule of law regarded as essential in the legal order of the European Union and therefore in the legal order of that State. This is the case of an error affecting the application of Article 2(a) and Article 39 of that regulation requiring that the judgment of which enforcement is sought be given in a Member State.

When reviewing whether there has been a manifest breach of public policy in the Member State addressed through failure to comply with a substantive or procedural rule of EU law, the court of that State must take account of the fact that, save where specific circumstances make it too difficult or impossible to exercise the legal remedies in the Member State of origin, the individuals concerned must avail themselves of all the legal remedies available in that Member State with a view to preventing such a breach before it occurs.