Streszczenie:
Wyrok w sprawie London P&I Club miał wyjaśnić niektóre kwestie związane ze stosunkiem sądownictwa polubownego do rozporządzenia Bruksela I przez określenie, czy znany prawu angielskiemu wyrok powtarzający treść wyroku sądu polubownego może być orzeczeniem w rozumieniu przepisu art. 34 rozporządzenia Bruksela I w zakresie, w jakim przepis ten pozwala na odmowę uznania orzeczenia z uwagi na sprzeczność z orzeczeniem państwa wezwanego. Trybunał Sprawiedliwości Unii Europejskiej, mimo udzielenia pozytywnej odpowiedzi na tak postawione pytanie, wprowadził zupełnie nowe wytyczne i ograniczenia w używaniu tej przesłanki odmowy uznania orzeczenia w celu uniemożliwienia stronom używania sądownictwa polubownego do omijania przepisów rozporządzenia Bruksela I. Glosa eksploruje przyczyny i historyczny kontekst wyroku w sprawie London P&I Club, starając się wyjaśnić tok rozumowania TSUE ponad to, co zostało napisane w uzasadnieniu wyroku, a ponadto dostarczyć szerszej perspektywy odnośnie jego skutków, w oderwaniu od angielskich wyroków powtarzających treść wyroku sądu polubownego.

Słowa kluczowe: uznawanie i wykonywanie orzeczeń, rozporządzenie Bruksela I, sądownictwo polubowne, arbitraż, zapis na sąd polubowny

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Commentary on the Judgment of the Court of Justice of the European Union of 20 June 2022, Case C-273/18, London P&I Club

Abstract:
The London P&I Club judgment was expected to settle down certain issues regarding the relationship between arbitration and the Brussels I Regulation by deciding whether a judgment made under a United Kingdom law in terms of an arbitral award may be recognized as a judgment within the meaning of Article 34 of the Brussels I Regulation to the extent this provision permits refusal of recognition on the grounds of irreconcilability with a judgment of a Member State addressed. Despite giving an affirmative answer to the above question, the Court of Justice of the European Union has introduced completely new guidelines and limitations on the use of the irreconcilability grounds for refusal of recognition in order to prevent parties from abusing arbitration in order to circumvent binding provisions of the Brussels I Regulation. The commentary explores the grounds and historical context of the London P&I Club judgment, aiming to uncover the CJEU’s train of thought beyond what has been written in the court opinion, as well as attempting to provide a broader perspective on its consequences, beyond English judgments in terms of an arbitral award.

Keywords: recognition and enforcement of judgments, Brussels I Regulation, arbitration, arbitration clause

1. Introduction

On June 20, 2022, the Grand Chamber of the Court of Justice of the European Union resolved the question referred for a preliminary ruling by the High Court for England and Wales in the case C-700/20 Steam Ship Owner’s Mutual Insurance Association (the London P&I Club) v. the Kingdom of Spain². The Court found that Art. 34 par. 3 of the Brussels I Regulation³ should be interpreted as meaning that a judgment given by a court of a Member State and reproducing the content of an arbitration award does not constitute an award within the meaning of that provision, if the award giving rise to an effect equivalent to that of that arbitration award could not be issued by a court of that Member State without infringing the provisions and fundamental purposes of this regulation, in particular the relative effectiveness of the arbitration clause included in the insurance contract and the lis pendens norms contained in Art. 27 of this regulation, but the judgment may not, in this case, prevent the recognition of a judgment issued by a court in another Member State in the said Member State⁴. Moreover, Art. 34 par. 1 of the Brussels I Regulation should be interpreted as meaning that, assuming that Art. 34 point 3 of this regulation does not apply to an award repeating the content of an arbitration award, the recognition or enforcement of an award originating in another Member State may not be refused on

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² Hereinafter referred to as: London P&I Club judgment, ECLI: EU: C: 2022: 488.
⁴ Point 1 of the operative part of the London P&I Club judgment.
the grounds that it is contrary to public policy on the ground that the award would violate the res judicata of the judgment.

The main proceedings concerned the recognition of a judgment of a Spanish court, which awarded the insurer to pay compensation for the benefit of the Spanish State Treasury for environmental damage related to the sinking of the Prestige tanker off the coast of Spain. The shipowner's liability insurance contract contained an arbitration clause and a pay-to-be-paid clause effective under English law, according to which the insurer, as a rule, is only liable up to the amount of damage actually repaired by the insured.

Having learned about the pending proceedings before a Spanish court, the insurer applied to the arbitration court for a determination that the aggrieved Kingdom of Spain may pursue claims arising from the accident at issue only before the arbitration court and that, as a result of the pay-to-be-paid clause, the insurer's liability is limited to the amount of damage actually repaired by the shipowner. By a judgment of February 13, 2013, the English arbitration court having jurisdiction under the arbitration clause contained in the insurance contract ruled in accordance with the insurer's request. Subsequently, the insurer applied to an English court for recognition of the judgment of the arbitration tribunal and for the issuance of judgment repeating the content of the arbitration award, and these claims were legally accepted by the English courts.

The referring court's doubts were as to whether it could refuse to enforce the Spanish court's ruling due to the inconsistency with the English court ruling repeating the content of the arbitration award pursuant to Art. 34 point 3 of the Brussels I Regulation, or whether it may refuse to execute this judgment, invoking the public policy clause pursuant to Art. 34 point 1 of the same regulation.

This publication will deal only with the issue resolved by the first point of the operative part in the London P&I Club judgment (the first two preliminary questions that the CJEU treated jointly). The second point of the operative part of the judgment (the third question referred for a preliminary ruling) and the reasoning in paragraphs 74-80 relating to it concern an obvious issue which has already been analyzed many times by the Court, namely the impossibility of applying the public policy clause in order to refuse enforcement of a judgment as contrary to the national judgment, and do not require, in the author's opinion, any further comment.

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5 Point 2 of the operative part of the London P&I Club judgment.
6 A detailed description of the facts and the procedure leading to the preliminary ruling is contained in paragraphs 24-40 of the London P&I Club judgment.
To conclude the preliminary considerations, it should be noted that although the remainder of this publication refers only to the provisions of the Brussels I Regulation for the sake of clarity, as they were the basis for the CJEU's ruling, the following considerations remain valid in their entirety under the currently applicable Brussels I bis Regulation. To determine the equivalence of provisions, please refer to the correlation table in Annex III to the Brussels I bis Regulation.

2. The issue of the definition of a judgment under the Brussels I Regulation

All the pre-judgment proceedings, including the reference for a preliminary ruling and the Opinion of the Advocate General, focused primarily on the issue of whether the award repeating the content of the arbitration award constitutes an award within the meaning of Art. 34 par. 3 of the Brussels I Regulation. The Court's considerations in the Solo Kleinmotoren case were the source of the referring court's doubts.

In the Solo Kleinmotoren case, the Court ruled that Art. 27 par. 3 of the Brussels Convention must be interpreted as meaning that a court settlement within the meaning of that provision does not constitute a judgment. The Court acknowledged that, although, under the Brussels Convention, court settlements are recognized and enforceable, in principle, on a par with judgments, but nevertheless an exception under Art. 27 point 3 of the Convention, which allows for the refusal of recognition of a judgment due to inconsistency with the judgment given in the requested State, should not be interpreted extensively.

The Court further elaborated that the key difference between a court ruling and a settlement concluded before a court is the fact that by issuing the ruling, the state-party resolves the relations between the parties in an authoritative manner, and the settlement comes from the parties to the proceedings. As it seems, the Court, wishing to narrow down the admissibility of refusal to recognize judgments, aimed at the conclusion that a necessary condition for the application of Art. 27 par. 3 of the Brussels

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11 Operative part of the Solo Kleinmotoren judgment.
12 Points 17-18 of the Solo Kleinmotoren judgment.
Convention is to protect the authority of the requested state and not merely to establish a binding arrangement between the parties.

Referring to the above considerations, the referring court in the London P&I Club case specifically doubted whether the award repeating the content of the arbitration award would rule over the relations between the parties. It was also noted that, on the one hand, by issuing such a judgment, the English court exercises its discretionary power and should consider issues such as the interests of the parties and the public interest. On the other hand, issuing such an award may not completely deprive the matter of significance of the fact that the substance of the matter was examined by an arbitration court, and not a state court, and the purpose of such proceedings is essentially the enforcement of an arbitration award.

The Court, on the other hand, treated this issue extremely superficially. First, by referring to its previous case law, it stated that there is no doubt that the award repeating the content of the arbitration award falls within the scope of the exclusion under Art. 1 par. 1 let. d of the Brussels I Regulation. Then, referring to the Hoffmann case judgment, it stated that the mere exclusion of a given type of judgment pursuant to Art. 1 does not automatically decide that such a judgment does not constitute a judgment within the meaning of Art. 34 par. 3 of Regulation No 44/2001. Having failed to refer that ruling in any way to the legal and factual status of the present case, the CJEU then concludes that an award repeating the content of the arbitration award may constitute grounds for refusing recognition and enforcement of the award pursuant to Art. 34 par. 3 of Regulation No 44/2001.

Although, in fact, it can be concluded from the Hoffmann judgment that the exclusion of a given type of cases from the scope of application of the Brussels I Regulation is not self-determined, the CJEU did not refer at all to a number of arguments against giving an award repeating the content of the arbitration award, and which, as indicated above, constituted the main axis of the dispute in the case.

The factual and legal situation in the Hoffmann case was so diametrically opposed that it is astonishing that the CJEU relates its considerations to the factual and legal situation in the present case without any justification. In the Hoffmann case, the claimant sought enforcement in the Netherlands of a judgment given by a German court ordering her the maintenance from her husband, the spouses having been legally divorced before a Dutch court. Maintenance cases fell within the scope of the 1968

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Brussels Convention, which was then interpreted by the Court, while divorce cases were explicitly excluded from it.

Already at first glance, it can be seen that the divorce decree, due to the fact that it constitutively interferes with the marital status of natural persons, is not comparable to a ruling repeating the content of an arbitration award. First of all, however, it seems that the main reason for the decision in the Hoffmann case was the fact that a final divorce would exclude the enforceability of the judgment awarding maintenance, even if the maintenance was awarded by a Dutch court. The Court noted that the Brussels Convention does not require states-parties to endow the judgments of other states-parties with greater force than their own. The Court did not make any reference to the question whether the disputed ruling repeating the arbitration award could make it impossible to execute an English court judgment analogous to a Spanish court judgment subject to recognition, which seems crucial from the point of view of making an analogy with the Hoffmann judgment.

3. Motives for the Court’s decision

The Court stated, however, that despite the fact that a judgment stipulated in English law repeating the content of an arbitration award may, in principle, constitute a ruling constituting a basis for refusing to recognize a foreign court's award pursuant to Art. 34 point 3 of the Brussels I Regulation, it is inadmissible in the present case due to its content, which is in fundamental contradiction to the other two standards resulting from the Brussels I Regulation\(^\text{15}\).

First, the Tribunal states that the jurisdiction rules contained in the Brussels I Regulation indicate that an arbitration clause contained in a third party liability insurance contract may have effect only between its parties and it is unacceptable to bind a third party - the aggrieved party by it\(^\text{16}\). Significantly, the Court did not invoke any provision of the Brussels I Regulation in this respect, referring only to its considerations in the Assens Havn case\(^\text{17}\).

The Assens Havn case, however, concerned a pro-judicial agreement directly regulated by the provisions of the Brussels I Regulation, and not an arbitration clause. In particular, the Court in Assens Havn case stated that the words "The provisions of this section (special jurisdiction in insurance matters) may only be departed from based on the contract when..." used in Article 13 of the Brussels I Regulation must be understood strictly and it prevents the effectiveness of such a contract from being

\(^{15}\) Point 59 of the London P&I Club judgment.

\(^{16}\) Points 60-63 of the London P&I Club judgment.

extended to a third party - the aggrieved party\textsuperscript{18}. The provision of Art. 22 par. 5 of the Brussels I Regulation, according to which prorogation agreements contrary to Art. 13 have no legal effect, was crucial for the settlement of that case\textsuperscript{19}.

The second objection raised by the CJEU against a British court judgment repeating the content of an arbitration award is already more specific and concerns the violation of Art. 27 par. 1 of the Brussels I Regulation, according to which if the courts of different Member States are pending cases involving the same claim and between the same parties, any court other than the court first seised shall, of its own motion, suspend the proceedings until the jurisdiction of the court first seised has been established.

The Court noted that on the day of instituting the proceedings before the arbitration court, i.e. on 16\textsuperscript{th} of January 2012, the case had already been pending before the Spanish court. The Court then explains only briefly that the case before the Spanish court and the case before the arbitration court had the same subject-matter, and then states that the English court, before issuing an award repeating the content of the arbitration award, should examine this circumstance in order to avoid circumventing the provisions and the fundamental objectives of the Brussels I Regulation\textsuperscript{20}.

4. The context of the case

Undoubtedly, the content and effects of this judgment should be considered in the context of the West Tankers judgment and the previous case law on anti-suit injunctions, i.e. judicial prohibitions to initiate court proceedings, aimed at securing the implementation of pro-judicial clauses or arbitration clauses. In the opinion of the Court, the provisions of the Brussels I Regulation preclude the imposition of such bans, primarily because they deprive the courts of the Member States of the right to adjudicate on their jurisdiction, conferred on them by the Brussels I Regulation. It was finally confirmed in the West Tankers judgment that the fact that arbitration was excluded from the scope of the Brussels I Regulation pursuant to Art. 1 par. 2 let. d was of no importance for that assessment\textsuperscript{21}.

\textsuperscript{18} Point 35 et seq. of the Assens Havn judgment.
\textsuperscript{19} Point 38 of the Assens Havn judgment.
\textsuperscript{20} Points 64-71 of the London P&I Club judgment.
\textsuperscript{21} Points 28-32 of the West Tankers judgment. For more on anti-suit injunctions in relation to EU law, see the case-law cited in point 14 of that judgment.
Following the West Tankers judgment, the Court took a step back in relation to the Brussels I Regulation to arbitration, issuing a judgment in Gazprom case. In the operative part of this judgment, the Court stated that the provisions of the Brussels I Regulation do not preclude the recognition and enforcement of an arbitration award prohibiting suing before a given court of a Member State, provided that the court of that Member State does so. The Court justified its position by stating that in such a case the court of a Member State does not interfere with the jurisdiction of the courts of other Member States, therefore the objectives of the Brussels I Regulation are not jeopardized.

The final judgment to bear in mind in setting out the context of the P&I Club judgment is this year’s H Limited case judgment. In the operative part of this judgment, the Court stated that an enforcement order issued by a court of a Member State in adversarial proceedings for the enforcement of a judgment of a third country court constitutes a judgment subject to recognition and enforcement under the provisions of the Brussels I bis Regulation.

In the London P&I Club judgment, the Court did not invoke the West Tankers judgment at all. Nevertheless, there is no doubt that granting the effectiveness of an English court judgment repeating an arbitration award declaring the effectiveness of an arbitration clause in a proceeding for the enforcement of an award of a state court of another Member State would be a consequence unacceptable to the Court, because it would lead to the same effects as making a judgment considering an anti-suit injunction effective.

With the ruling in the case of H Limited, the Court deprived itself of the simplest way out of the situation, i.e. the refusal to grant the award repeating the content of the arbitration award the status of an award. The analogy between an enforcement order for the enforcement of a third country award and an award repeating the content of an arbitration award is all too visible, as the Court itself admitted.

Obviously, even apart from the Gazprom judgment, the Court could not conclude that the English court was per se incapable of issuing an award reiterating the effectiveness of the arbitration clause. This would lead to absurdity, preventing any state court ruling on arbitration clauses. It is these reasons that appear to have

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25 Point 49 of the London P&I Club judgment.
prompted the Court to seek another way to prevent the English court from refusing to comply with the Spanish judgment.

5. Consequences of the judgment and conclusion

The ruling of the Court, although it deserves approval to the extent that it allows the effectiveness of the idea arising from the judgment in the West Tankers case, to remain effective, nevertheless raises a number of interpretation problems and leaves the key issues regarding the relationship of arbitration with the provisions of the Brussels I (bis) Regulation unresolved.

At the outset, it should be noted that the Court does not expressly state whether any of the substantive issues discussed (binding a third party by an arbitration clause and breach of provisions on parallel proceedings) would be of significance on their own or only together constitute such a significant infringement made by the court of the requested state, that it prevents the requested state from relying on that decision to refuse recognition of a judgment of another Member State. It seems, however, that they would be sufficient on their own, because each of them separately leads to a spontaneous circumvention of the mandatory provisions of the Brussels I Regulation.

Secondly, it seems that the considerations of the CJEU can be applied to any situation where the provisions of the Brussels I Regulation limit the admissibility of concluding pro-regulatory agreements in order to protect the weaker party to trade. The essence of the CJEU's reasoning seems to be the objection to circumventing these bans through an arbitration clause. The present case concerned the effectiveness of the arbitration clause contained in the insurance contract in relation to the injured party, which, taking into account the judgment in Assens Havn and the case law cited there, was an obstacle to Art. 13 point 5 of the Brussels I Regulation, but consequently the same reasoning should be applied to the remaining points of Art. 13, as well as Art. 17 and 21, establishing restrictions on concluding pro-regulatory agreements in consumer and employee matters, respectively.

It seems unresolved, however, whether the same also applies to cases in which Art. 22 of the Brussels I Regulation provides for the exclusive jurisdiction of a court of a Member State. Even though we are dealing in a sense with the circumvention of the provisions of the Brussels I Regulation, the purpose of this provision is not to protect the weaker side of trading\textsuperscript{26}.

\textsuperscript{26} Incidentally, it is worth noting that the issue of the admissibility of an arbitration clause, including a foreign one, in a case falling under the exclusive jurisdiction of Polish courts, generally does not raise doubts in Polish jurisprudence. See e.g. the decision of the Supreme Court of February 16, 1999, case file. No. I CKN 1020/98, LEX No. 37962.
Another unresolved question is whether the location of the seat of the arbitration court matters. In other words, whether Art. 13, 17 and 21 of the Brussels I Regulation may prevent the effectiveness of an arbitration clause situated in a country of special jurisdiction, from which they restrict departure. On the one hand, due to the specific nature of the proceeding before the arbitration court, such a request could actually contribute to the protection of the weaker parties to trade. On the other hand, there are doubts as to whether the provisions of the Brussels I Regulation are actually circumvented in such a situation, since the *locus fori* does not change.

As regards the violation of the rules on parallel proceedings by the English court, it should be stated that here the Court has further blurred the differences between proceedings before an arbitration court and proceedings before a state court. The CJEU argues that the provisions of the Brussels I Regulation would be circumvented by ensuring the effectiveness of an arbitration award issued in a proceeding instituted later than the proceeding between the same parties on the same subject before a state court. In the opinion of the Court, such a conclusion should be drawn from the prohibition of parallel proceedings laid down in Art. 27 of the Brussels I Regulation.

Therefore, it is of fundamental importance whether the proceedings before the state court about these parties and about the subject of the proceedings before the arbitration court could be conducted. This could be summed up as meaning that the provisions of the Brussels I Regulation preclude the initiation of proceedings before an arbitration court if a state court of a Member State considers itself competent. However, it should be stipulated that the state court does not have to do it directly, and the arbitration court is not the addressee of the norms resulting from the Brussels I Regulation, the obligation to comply with them only becomes effective at the stage of proceedings aimed at recognition or enforcement of a ruling conducted by the state court.

Here is the right place to make some important general remark. Although there are significant differences between a proceeding aimed at recognizing or executing an arbitration award directly and issuing an award repeating the content of the arbitration award, it seems that the considerations of the CJEU, according to which English courts should pay attention to the circumvention of the provisions of the Brussels I Regulation, will apply to the same extent to both types of proceedings.

In other words, if the effects resulting from the recognition or enforcement of the arbitration award could circumvent the provisions of the Brussels I Regulation, the state court is obliged to refuse such recognition or enforcement. The considerations of the CJEU in the Gazprom case seem to lead to such a conclusion. That case concerned
the recognition and enforcement of an arbitration award directly, and yet the Court considered the matter in substance and admitted the recognition of an award granting an anti-suit injunction due to the fact that, in fact, the court of a Member State only ruled on its own jurisdiction.

In the present case, however, the CJEU did not find a violation of the prohibition on adjudicating on the jurisdiction of another Member State, but circumvention of the provisions of the Brussels I Regulation of the *ius cogens* nature, the violation of which should have the same effect, regardless of which Member State the court will rule on recognition or enforcement of an arbitration award.

Finally, it should be noted that, despite the above theses, there is no doubt that a court decision to recognize or enforce an arbitration award, unlike an award repeating the content of an arbitration award, does not constitute a ruling within the meaning of Art. 34 par. 3 of the Brussels I Regulation and the refusal to recognize a judgment from another Member State cannot even be considered in the context of this ground.

To sum up, in the London P&I Club judgment, the Court of Justice of the European Union significantly limited the jurisdiction of the arbitration courts, although it did so in a completely different way than expected by the referring court and the Kingdom of Spain having an interest in such a decision. Due to the fact that the United Kingdom of Great Britain and Northern Ireland has left the European Union and, consequently, the decline in the importance of awards repeating the content of an arbitration award, the direction chosen by the Court, due to its universality, may have a significant impact on practice. However, due to the general nature of the considerations contained in the justification of the judgment, it will probably be the subject of interpretation disputes, until the case-law is specified in subsequent judgments.

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