

Irreconcilability and the Role of the CJEU post-Brexit*

La irreconciliabilidad y el papel del TJUE tras el Brexit

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Abstract: In the latest court decision in the context of the “Prestige” case, post-Brexit legal complexities came to the forefront. The “London P&I Club” contested a Spanish court’s decision demanding compensation for an oil spill. Invoking arbitration, the Club sought to prevent enforcement of the Spanish judgment in the UK. However, the CJEU ruled the arbitration couldn’t block the Spanish judgment’s recognition. Challenging this, Justice Butcher of the London High Court found the CJEU had overstepped its jurisdiction. He concluded the arbitration proceedings could indeed impede the Spanish judgment’s enforcement, highlighting tensions between UK courts and CJEU post-Brexit, and raising critical questions about arbitration’s role in international disputes and the principles of irreconcilability and public policy.

Keywords: Irreconcilability, res judicata, public policy, arbitration, enforcement.

Resumen: Las complejidades jurídicas post-Brexit pasaron a primer plano en el caso “Prestige”. El “London P&I Club” impugnó la decisión del tribunal español exigiendo una indemnización por derrame de petróleo. Mediante arbitraje, el Club trató de impedir la ejecución de la sentencia española en el Reino Unido. Empero, el TJUE dictaminó que el arbitraje no podía bloquear el reconocimiento de la sentencia. El juez Butcher, del Tribunal Superior de Londres, consideró que el TJUE había extralimitado su jurisdicción. Concluyó que el procedimiento arbitral sí podía impedir la ejecución de la sentencia, manifestando las tensiones entre los tribunales británicos y el TJUE post-Brexit, planteando cuestiones críticas sobre el arbitraje en los litigios internacionales, los principios de irreconciliabilidad y orden público.

Keywords: Irreconciliabilidad, res judicata, orden público, arbitraje, ejecución.

Summary: I. Introduction. II. Timeline and Key Events. 1. The Schaff Award and its enforcement 2. The Spanish Proceedings. 3. The Club’s Appeal and CJEU Preliminary Ruling. 4. The Gross Awards. III. Reasoning by Justice Butcher. 1. Res Judicata. 2. Jurisdiction. 3. Spain’s Challenges. IV. Analysis. 1. Irreconcilability. A) Abstract. a) Hoffmann v Krieg. b) Italian Leather SpA v WECO Polstermöbel GmbH. B) The Application in this Case. C) Butcher’s Decision in light of the other judgments on this matter. a) CJEU Decision. b) Hamblen’s Decision. c) The Gross Awards. 2. Public Policy. A) Matter of Public Policy. B) The applicability of Article 34(1). a) Res judicata in case of court judgments. b) Res judicata in case of arbitral awards. C) Assertion of res judicata. V. Conclusion.

* Casenote on [2023] EWHC 2473 (Comm).

I. Introduction

1. The relationship between UK courts and the Court of Justice of the European Union (CJEU) post-Brexit is a topic of considerable legal interest and debate. In a striking move, Justice Butcher of the London High Court of Justice, on October 6, 2023, declared, “I do not consider that this Court is bound by paragraphs [54]-[73] of the CJEU judgment.” This statement came amidst the protracted legal dispute over the M/T Prestige oil spill involving the London P&I Club (“the Club”) and Spain.

2. The CJEU had previously ruled that the arbitration proceedings initiated by the British insurer could not block the recognition of the Spanish judgment which ordered the Club to pay compensation for the damage caused.¹ However, Justice Butcher decided that CJEU had gone beyond the terms of the reference and did not have jurisdiction to decide as it did, such that the Court was not bound to follow it. The Court also declined to follow the decision of CJEU on the merits and called into question the fairness of the process. As the following casenote will show, the difficult relationship between the UK and the EU is still being played out in court in the context of arbitration proceedings and the aftermath of Brexit.

3. This note aims to analyze Justice Butcher’s ruling, focusing on evaluating his discussion about the principles of irreconcilability and public policy.²

II. Timeline and Key Events

4. In November 2002, the M/T Prestige (“the Prestige”), an oil tanker, sank off the coast of Spain, causing not only extensive environmental pollution along the Spanish and French coastlines but also extensive international legal disputes that have since occupied the courts and arbitrators in many countries around the world. Mr. Justice Butcher’s decision is a testament to this, as it takes him the first 30 pages of the 94 pages long judgment to lay out and summarize the interrelated court and arbitration decisions, as well as the relevant facts and arguments leading up to his judgment. These key events will be summarized as concisely as possible in the following.

5. The disaster first led to the initiation of criminal proceedings in Spain against the vessel’s Master and other crew members as well as a Spanish official, responsible for handling the aftermath. In 2010, the Master was charged with the offense of serious negligence against the environment and with the offense of disobedience to the authorities. Civil claims were also brought by various parties, one of them being the Shipowners liability insurer, the “London Steam-Ship Owners’ Mutual Insurance Association Limited” (“the Club”), under Article 117 of the Spanish Penal Code as well as pursuant to the International Convention on Civil Liability for Oil Pollution Damage 1992 (“the CLC”). The Club, however, as per an obligation binding on them contained in the Club Rules, contended that these claims should be resolved through arbitration in London, rather than through court proceedings.

1. The Schaff Award and its enforcement

6. After the Club commenced separate arbitrations against Spain and the French State, Mr. Alistair Schaff KC was appointed by the Commercial Court as the sole Arbitrator in both arbitrations. This led to the 2013 “Schaff Award”, where the arbitrator declared that Spain was obligated to refer its claims to London arbitration. Pursuant to the ‘pay to be paid’ clause in the Club’s Rules, the Club, he declared that the Club was not liable to Spain in the absence of prior payment to Spain by the Owners

¹ CJEU, 20.06.2022, C-700/20, ECLI:EU:C:2022:488, hereinafter referred to as the CJEU Judgment.

² The specific questions are whether (1) the Spanish Judgment is irreconcilable with the English S. 66 Judgments; and (2) enforcement would be contrary to English public policy because it would be contrary to the rule as to *res judicata*.

and/or Managers of the vessel of the full amount of any insured liability and capped the Club's liability at US \$1 billion, a decision that would shape the course of the subsequent legal battles. Following the Schaff Award, the Club sought its enforcement as a judgment pursuant to Section 66 (1) of the Arbitration Act 1996. Spain, in response, mounted a defense and counter arguments, claiming the arbitrator had no jurisdiction to make such an award and invoked state immunity against the enforcement efforts. Justice Hamblen ruled in favor of the Club, a decision later upheld against Spain's appeals in 2015 (both decisions together the "English s. 66 Judgments").

2. The Spanish Proceedings

7. Meanwhile, the Spanish legal system was concurrently processing the case. In November 2013, the Provincial Court of La Coruña found no civil liability for the Club. However, this decision was overturned in January 2016 by the Spanish Supreme Court, which found civil liability against the Master, the Owners, and the Club, remitting the question of quantum back to the Provincial Court. The subsequent Quantum judgment, issued in November 2017 and later upheld by the Spanish Supreme Court, led to Spain applying for the enforcement of these judgments against the Club and the vessel's Owners in January 2019, pursuant to Article 43 of Regulation (EC) No. 44/2001, the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Jurisdiction and Enforcement Regulation")

3. The Club's Appeal and CJEU Preliminary Ruling

8. The Club appealed on grounds that would set the stage for Mr. Butcher's judgment ("The Club's Appeal"). As Article 45 of the Enforcement Regulation binds the appellant to the grounds specified in Articles 34 and 35, the Club claimed the Spanish judgments would be irreconcilable with the UK Awards (Article 34(3)). Furthermore, they appealed on Res Judicata grounds and human rights violations (Article 34(1)). The Club's Appeal came in front of Justice Butcher in December 2020. Meanwhile, Spain issued an application for a Reference to the CJEU for Preliminary Rulings.

9. In their decision in June 2022, the CJEU recognized that in general, the UK Arbitration and the Spanish judgment would be irreconcilable, thus agreeing with the argument brought forward by the Club. However, it noted that the principle of Lis Pendens - pending litigation - prevented this outcome (further explained within paragraphs 18-21).

4. The Gross Awards

10. The Club also initiated new arbitration proceedings against Spain for breaching their arbitration obligations. Spain answered by claiming State-immunity and - alternatively - that the Court had no jurisdiction. Justice Henshaw dismissed Spain's Immunity claims and appointed Sir Peter Gross as arbitrator. The hearings had taken place in September 2021 and January 2022. While Sir Peter Gross was preparing the award, the CJEU gave the judgment referred to above. Spain sought that Sir Peter Gross should hear further submissions as to the impact of the CJEU Judgment on the arbitration, leading to further oral hearings in September and November 2022. In January 2023, Sir Peter Gross issued the First Partial Award, mostly. This was followed by the Second Partial Award in March 2023, formalizing the relief granted to the Club. Spain, however, challenged the Gross First Award, alleging misinterpretation of the CJEU judgment, lack of jurisdiction for injunctions.

11. This challenge, as well as that of the Club against the registration of the Spanish judgment for recognition and enforcement, leads us to the present judgment.

III. Reasoning by Justice Butcher

12. In “London Steam Ship Owners Mutual Insurance Association v Spain”, [2023] EWHC 2473 (Comm), Mr. Justice Butcher of the High Court of Justice ultimately ruled in favor of the Club and held that Spain’s attempt to enforce the Spanish decisions in the UK was unlawful due to irreconcilability with the Arbitration Award in the UK. He thereby upheld the Gross Awards against Spain’s challenges and ruled in favor of the appeal against Spain’s Application of Enforcement.

13. In the Judgment, had to resolve several matters laid out by both parties. First, he had to decide on the remaining issues in the Clubs Appeal (Claim No. CL-2019-000518) and second, he had to decide on Spain’s challenges to the Gross Awards (Claim No. CL-2023-000050). For the Clubs Appeal, he had to decide on the material topic of Irreconcilability, as well as on the arguments pro and contra being bound by the CJEU Decision on grounds of Res Judicata, Jurisdiction and Public Policy. Concerning the Challenges by Spain he had to first decide whether to give permission to their appeal and secondly go through their application concerning mostly the interpretation and effect of the CJEU Judgment regarding Sir Peter Gross’s Jurisdiction and the question whether Spain had breached their obligation to arbitrate. Spain also challenged whether the Arbitrator had had the power to award equitable compensation against them.

14. Since the matters of irreconcilability and Public Policy will be analyzed more thoroughly in the subsequent chapter, they will thus be left out of this part.

1. Res Judicata

15. Spain had contended that the Decision of the CJEU was a binding determination of the effect that Article 34(3) of the Jurisdiction and Enforcement Regulation (Irreconcilability) was not applicable for arbitration awards if a judgment on the same terms could not have been entered by the enforcing court. The Club disputed that the CJEU Decision was binding in this regard as it was based on the holding that the English s. 66 Judgments could and should not have been given. This issue however had – according to the Club - already been decided by the English Courts. Thus, the issue was “Res Judicata” and could not be displaced by the subsequent CJEU Decision. Since the non-recognition of the English S. 66 Judgments within the Jurisdiction and Enforcement Regulation based on the subsequent CJEU Ruling would contradict the prior final ruling of the English Courts, relying on the CJEU Decision would be “manifestly contrary to public policy” pursuant to Article 34(1). Conversely, Spain argued that there was no conflict between the English S. 66 judgments and the CJEU judgment and therefore no ground for Res Judicata. They claimed that the English Court hadn’t ruled on the relevance of its ability to render judgment on the claims under the Regulation during the original proceedings.

16. Justice Butcher reviewed the decisions made by Hamblen J in 2013 and the Court of Appeal in 2015. He noted that Spain had put forward arguments in connection with the Jurisdiction and Enforcement Regulation: Either the S. 66 Judgment would not be a judgment within the meaning of Article 34(3), therefore it would not preclude a contrary Spanish judgment and therefore would be no utility in granting it. Or else the S. 66 Judgment represented such a judgment in the sense of the Article 34(3), in which case it would be contrary to the regulation itself, since the Lis Pendens provision in Article 27 would have prevented its creation. Judge Hamblen had dismissed these arguments.

17. To Justice Butcher, this finding made it clear that Hamblen had reached a conclusion regarding Spain’s argument of inconsistency with the Regulation. Hamblen had decided that the S. 66 Judgment could and should be entered and that norms of Regulation could not prevent this, since it does not apply to arbitration. The subsequent decision of the CJEU which Butcher found to be plainly

inconsistent with Hamblen's reasoning³ cannot therefore be applied for reasons of Res Judicata. He also rejected any exemptions from Lis Pendens in this case.

2. Jurisdiction

18. In this portion of the judgment, Justice Butcher evaluates the Club's contention that the CJEU had overstepped its jurisdiction in its decision regarding the English S. 66 judgments. If so, the question would remain whether he would still be bound by it or could apply his own reasoning. Specifically, the focus was lying on paragraphs [54]-[73] of its judgment. Before, the CJEU had decided that an arbitral award can constitute a judgment within the meaning of Article 34(3) of the Jurisdiction and Enforcement Regulation, thus rendering the Spanish judgments possibly irreconcilable and therefore not enforceable in England. In [54]-[73], the court said that Article 34(3) still could not apply, since there was pending litigation in Spain when the Arbitration that concluded in the Award, was initiated. Since the Award could therefore not have been the subject of a judicial decision falling within the scope of the Regulation, as Article 27 would have required the court to decline its jurisdiction, "in such circumstances, a judgment entered in the terms of an arbitral award [...] cannot prevent, under Article 34(3) of Regulation No. 44/2001, the recognition of a judgment from another Member State."⁴ This meant that the recognition of a decision (here: the Spanish one) can in principle be prevented by the English court "re-dressing" an arbitration award into a decision of the court through a S.66 Judgment - but only if the arbitration award also does justice to what one might have expected from a state court.⁵

19. The club was of the opinion that the CJEU gave answers to questions which had not been referred to it, and which had been actively refused to refer. The questions were whether a S. 66 judgment could fall within Article 34(3) in light of two specific points, not whether there were other reasons to deny its applicability. Spain on the other hand contended that the CJEU had power to reformulate questions and give qualifications to the answer in relation to the question if otherwise it would have given an answer to the question which it does not consider to be correct.

20. Justice Butcher then revisits the legal framework of Article 267 TFEU and the Withdrawal agreement, emphasizing the cooperative nature of the preliminary reference procedure between national courts and the CJEU. In his view, the CJEU went "far and plainly beyond"⁶ reformulating the questions asked and had addressed what were in substance different questions. He deemed it to be not within the Court's remit to answer questions that the national court has expressly or implicitly refused to refer. Because of that, the CJEU had "trespassed on the facts of the case."⁷

21. In addition, he considered that the CJEU applied the law to the facts based on an incomplete understanding of the case, especially considering the earlier proceedings which had resulted in the English S. 66 judgments. The CJEU had not taken into account that certain issues - such as the applicability of an Arbitral Award in light of fundamental principles of the Regulation - had already been raised and decided in earlier proceedings, for which reason they were Res Judicatae. As per his conclusion, under the Withdrawal Agreement, the English Court would post-Brexit not be bound by the CJEU's overreaching segments. He did not subsequently make his own decision on this issue, but recognised that the Hamblen decision had Res Judicata effect and that it was therefore not for the CJEU or him to make a contrary decision.

³ Judgment, para. 186.

⁴ CJEU Judgment, para. 72.

⁵ Hartenstein in: "Recht der Transportwirtschaft", 2022, 458 para. 53.

⁶ Judgment, para. 227.

⁷ Judgment, para. 214.

3. Spain's Challenges

22. In this section, Justice Butcher addresses Spain's Challenges to the Gross Awards, particularly focusing on their applications under sections 67 and 69 of the Arbitration Act 1996.

23. For the section 67 application, Spain contends that the CJEU judgment entitled it to bring direct action claims in Spain, which would negate Sir Peter Gross's jurisdiction in the arbitration. However, Justice Butcher confirms Gross's jurisdiction, referencing the Court of Appeal's decision in *The Prestige Nos 3 & 4*, which had already established Gross's authority. Furthermore, the CJEU judgment had not dealt with the issue of the arbitrator's jurisdiction to begin with and if it had so, it would have once again overstepped its power. As a result, Justice Butcher dismissed this aspect of Spain's section 67 application.

24. Regarding section 69, Spain was seeking permission to appeal on four points, particularly those based on the CJEU judgment. Justice Butcher, while agreeing that these points may be of general public importance and at least open to serious doubt, ultimately dismisses the appeal. He reasons that the CJEU judgment does not address Spain's obligation to arbitrate nor Gross's jurisdiction. Justice Butcher asserts that the CJEU's findings in paragraphs [54]-[73] are not binding if they address unasked questions or attempt to apply law to the facts.

25. The judgment then delves into the arbitrator's power to award equitable compensation for Spain's breach of obligation to arbitrate. Justice Butcher agrees with Sir Peter Gross's conclusion that equitable compensation should be available in such cases, aligning with the notion that monetary compensation is appropriate for breach of any obligation equivalent to a contractual obligation. Regarding the power to grant an injunction against a sovereign state, the judgment discusses the limitations imposed by the State Immunity Act 1978 (SIA) and the AA 1996. Justice Butcher concludes that the court and, by extension, an arbitrator, do not have the power to grant an injunction against a state in the absence of its consent. This interpretation is based on the understanding that s. 13(2) SIA limits the court's jurisdiction and power.⁸ He also notes that the Club's argument, seeking to enforce such an injunction in other jurisdictions, does not align with the legislative intention of Parliament.

26. Justice Butcher concludes that a court, and hence an arbitrator, could not grant damages in lieu of an injunction under s. 50 of the Senior Courts Act (SCA) against a state without its consent. This conclusion supports his view that equitable compensation should be available, and its availability should not be contingent on the power to grant an injunction.

IV. Analysis

27. The following analysis is intended to examine the points of the irreconcilability and public policy debate within the judgment in more detail.

1. Irreconcilability

28. Since Justice Butcher has devoted more than 20 pages to this part of his judgment, it makes sense to undertake a more detailed analysis of Irreconcilability. For this purpose, an abstract explanation of the principle is first provided, followed by how it was applied in the present case.

⁸ Judgment, para. 351, referring to *Saville* in *A Co Ltd v Republic of X* [1990] 2 Lloyd's Rep 520.

A) Abstract

29. Irreconcilability refers to a situation where two judgments entail legal consequences that are mutually exclusive, making it impossible for them to coexist within a single legal framework; The concept of irreconcilability in international law serves as a mechanism to maintain legal coherence when cross-border judicial decisions intersect.⁹ In the EU, the legal framework for addressing irreconcilability is outlined in the Brussels I Regulation (EU) 1215/2012 (informally known as “Brussels 1 bis”) which is effective since 1 January 2015. Pursuant to Article 46, the enforcement of a judgment shall be refused where one of the grounds referred to in Article 45 is found to exist. Article 45 paragraph 1 c) provides that the recognition of a judgment shall be refused if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed.

30. The question of irreconcilability of judgments has been subject to various EU-cases which have specified its requirements.

a) *Hoffmann v Krieg*

31. In *Hoffmann v Krieg*, the parties were German nationals who married in Germany in 1950.¹⁰ In 1978, the husband settled in the Netherlands. In 1979, at the wife’s request, he was ordered in Germany to pay her a monthly maintenance pension. At the husband’s request, the marriage was divorced in the Netherlands in 1980 and entered in the civil status register of Den Hague in the same year; since then, the marriage has been deemed dissolved in the Netherlands. When she subsequently tried to enforce her maintenance claim in the Netherlands, he lodged an appeal which he won at first instance and lost at second instance. The question of the irreconcilability of the two decisions was then referred to the ECJ, which said the following: “In order to ascertain whether the two judgments are irreconcilable [...], it should be examined whether they entail legal consequences that are mutually exclusive.”¹¹

32. In that case, the order for enforcement of the foreign maintenance order was issued at a time when the national decree of divorce had already been granted. The German judgment necessarily presupposes the existence of the marriage and would have to be enforced in a Country where that relationship had been dissolved by a judgment between the same parties. Accordingly, the German judgment was irreconcilable with the Dutch divorce decree and could therefore not be enforced in that country.

b) *Italian Leather SpA v WECO Polstermöbel GmbH*

33. In *Italian Leather SpA v WECO Polstermöbel GmbH*, Germany and Italy had issued conflicting interim orders about marketing products under a specific brand name.¹² While Germany had refused the order, Italy had granted a similar application. When the question arose whether the Italian order could be enforced in Germany, the Court once again had to decide whether the judgments entailed mutually exclusive legal consequences. In this case, the Court focused their analysis solely on the judgments’ legal effects. “Irreconcilability lies in the effects of judgments. It does not concern the requirements governing admissibility and procedure which determine whether judgment can be given and which may vary from one Contracting State to another.”¹³

⁹ *Stadler/Krüger* in: *Zivilprozessordnung*, 20th ed. 2023, EuGVVO Art. 45, para. 14.

¹⁰ *Hoffmann v Krieg* [1988] ECR 645.

¹¹ *Hoffmann v Krieg*, para. 22.

¹² *Italian Leather SpA v WECO Polstermöbel GmbH*, [2002] ECR I-4995.

¹³ *Italian Leather SpA v WECO Polstermöbel GmbH*, para. 44.

34. Based on these fundamental decisions, which concretised the concept of irreconcilability, the decision of Justice Butcher was also rendered.

B) The Application in this Case

35. Before Brussels 1 bis came into effect in 2015, the issues of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters were handled by Regulation (EC) No. 44/2001 (for reasons of readability within this casenote referred to as “Jurisdiction and Enforcement Regulation”). Spain had issued the CPR part 23 application seeking to enforce the Spanish judgment on 28 May 2019. The continued use of the older Regulation can be explained by Article 66 (2) of Brussels 1 bis, which states that “Regulation (EC) No 44/2001 shall continue to apply to judgments given in legal proceedings instituted [...] before 10 January 2015 [...]”. Since the proceedings for the Spanish judgment – the enforcement of which Spain sought in the UK – were initiated before 2015, the old Regulation would apply. This does not lead to a different result, since Article 34, which deals with irreconcilability in paragraph 3, and the subsequent Article 35 were incorporated almost identically into the new Article 45 of Brussels 1 bis.

36. In the present case, there were essentially three points to consider concerning the matter of irreconcilability: (a) Is the Spanish Judgment irreconcilable with the English S. 66 Judgments? (b) Does the English S. 66 Judgment fall under Article 34(3) of the Jurisdiction and Enforcement Regulation? (c) Should an exception be made to the applicability of Art. 34(3) due to exceptional circumstances?

37. a) The Club contended that the English S. 66 judgments were irreconcilable with the Spanish Judgment simply due to the fact that it entailed a different legal outcome than the Spanish one. The English judgments had declared the Club not liable to Spain due to the “Pay to be Paid” clause in the Club’s rules and the absence of prior payment by the owners while the Spanish judgment held the Club liable. Spain countered that the judgments could be reconciled. Their stance was that the English judgments were specific to the circumstances at their issuance and didn’t preclude the Club’s liability as determined in the Spanish judgment. Based on the case law of *Hoffmann v Krieg* and *Italian Leather*, Justice Butcher came to the conclusion that, since irreconcilability is determined solely by effects the judgments produce, not by their reasoning or procedural steps, the judgments were indeed irreconcilable. Previous court decisions, including the CJEU, had also come to this conclusion.

38. b) Several arguments were now brought forward by Spain, disputing the applicability of Article 34(3) if the judgments were to be deemed irreconcilable.

39. Solo Point: Spain argued that the English S. 66 judgments were not relevant ‘local’ judgments for the purposes of Article 34(3) because they were not judgments of ‘a judicial body of a Contracting State deciding on its own authority on the issues between the parties’. This argument was based on the ECJ decision in *Solo Kleinmotoren GmbH v Emilio Boch*¹⁴. The Club countered that the decision in *Solo Kleinmotoren* had to be confined to the case of court-approved settlements. They argued that an order under s. 66 AA 1996 does involve a judicial decision and is not simply passive, thereby qualifying as a relevant judgment.

40. Material Scope Point: Spain contended that Article 34(3) should only apply to judgments falling within the material scope of the Regulation. They argued that the English S. 66 judgments, being related to arbitration, fell outside this scope. The Club argued that Article 34(3) should apply to any local judgment, regardless of whether it arises in Regulation proceedings, to protect the integrity of a Member State’s internal legal order.

¹⁴ *Solo Kleinmotoren GmbH v Emilio Boch* [1994] ECLI:EU:C:1994:221

41. Mutual Trust Point: Spain suggested that the English S. 66 judgments undermined the principle of mutual trust, by interfering with the jurisdiction of another Member State. The Club refuted this, emphasizing that the judgments did not prevent Spain from accessing Spanish courts or review the Spanish court's jurisdiction.

42. Justice Butcher ruled in favor of the Club primarily based on the principle of maintaining the integrity of the English legal order. Contrary to Spain's argument, he determined that the English judgments were not merely passive recordings of an arbitration outcome but involved active judicial decisions, hence qualifying as 'local' judgments under Article 34(3). He also dismissed Spain's contention that these judgments fell outside the Regulation's scope, emphasizing that the Regulation did not exclusively apply to judgments within its subject matter, as seen in Cases like *Hoffmann v Krieg*. Furthermore, Butcher rejected the mutual trust argument, finding that the English judgments did not interfere with the Spanish court's jurisdiction nor did they review its appropriateness, thus upholding the principle of mutual trust within the EU's legal framework.

43. c) Within the English S. 66 Judgments, Hamblen had to decide on the Spanish argument that his judgment would subvert the Regulation jurisdictional regime, and in particular the provisions as to *Lis Pendens* in Article 27(1), as the Spanish court proceedings had begun earlier than the British Arbitration. Justice Butcher later agreed that the English Courts were not bound by the CJEU's decision and ruled that the argument concerning *Lis Pendens* in Article 27 was subject to *Res Judicata* and therefore no longer subject to his judgment (See above in paragraphs 15-21).¹⁵ The substantive decision on this issue was therefore made solely by Hamblen within the S. 66 Judgments:

44. Hamblen had said that the argument assumes that the court should treat the S.66 application as if it was regulated by the Jurisdiction and Enforcement Regulation. Since Arbitration and its application to be enforced falls outside this regulation, he did not see a reason to apply its principles. "As the Club put it, why should the court refuse to grant a party the full benefit of an award which it has because to do so would run counter to the scheme of a Regulation that does not apply to arbitration?"¹⁶ In the appeal following Judge Hamblen's decision, Spain included counterarguments in Ground 3 of its appeal. However, on the second day of the appeal, Spain withdrew Ground 3, citing time constraints and the complexity of the matter.¹⁷ They suggested waiting for a Spanish judgment. Justice Butcher noted that Spain's decision not to pursue the entire Ground 3 left Hamblen J's decision on certain aspects undisturbed, thus having a *Res Judicata* effect. He therefore did not find Spain's actions during the appeal to be helpful to their case, as they could not reserve their right to challenge the decision on this point.

C) Butcher's Decision in light of the other judgments on this matter

45. Justice Butcher mostly cements previous judgments on the important question of the applicability of the Jurisdiction and Enforcement Regulation, mainly the CJEU Decision, Justice Hamblen's S. 66 Judgments and the Gross Awards.

a) CJEU Decision

46. Justice Butcher did not follow the Decision of the CJEU, as already discussed. Leaving aside Justice Butcher's lack of bindingness to the decision, the CJEU decision had grounds for criticism. The attempt to allow the Spanish judgments to prevail over the English arbitration revealed serious shortco-

¹⁵ Judgment, para. 203.

¹⁶ [2013] EWHC 3188 (Comm), para. 193.

¹⁷ Judgment, para. 180.

tings. On the one hand, the view that the English court decision was a judgment within the meaning of Art 34(3) of the Regulation was criticized. Rather, the logical conclusion of the Solo case law would have been to recognise that the state court in the case of S. 66 Judgments had not ruled on the points in dispute and therefore the “judgment quality” should be denied.¹⁸ Only an analogue application could be considered. However, the obviously result-oriented exception to which the CJEU refers on the basis of the “circumstances” under which the arbitration award was made seemed particularly worthy of criticism; the obligation to review judgments of member states and even the arbitration awards behind them is contrary to the system and jeopardizes legal certainty, which led to the CJEU being described, sometimes cynically, as having interpreted “judgment” in the sense of Art. 34(3) as “judgment free of all taint of jurisdictional error”¹⁹

47. The CJEU Decision thus requires the state court dealing with an arbitration award to hypothetically examine whether a state judgment with the content of the arbitration award would comply with the “provisions and fundamental objectives” of the Brussels Regulations. This leads to legal uncertainty as to which objectives and provisions are meant and how they are to be interpreted, which would have to be determined by the arbitral tribunal if it wishes to prevent its decision from subsequently having no effect. The scope of the decision is also unclear: Is it limited to judgments rendered pursuant to an arbitral award (as under English law), or does it also apply to orders that simply declare the award enforceable (as under German law)?²⁰

b) Hamblen’s Decision

48. Regarding Hamblen’s Decision, it turns out that the snag in the story may have been Spain’s failure to challenge the Hamblen decision on all points. Justice Hamblen had reached a final conclusion that the alleged inconsistency with the Regulation jurisdictional regime was not a good reason for not entering a S. 66 judgment because the Regulation did not apply to arbitration.²¹ This meant that any subsequent invocation of the same point would understandably face the accusation of *res judicata*, as it was subsequently decided by Justice Butcher.

c) The Gross Awards

49. Although Justice Butcher agreed with Peter Gross’s Decision of not being bound by the CJEU Decision, both clearly understood the Dilemma Situation they found themselves in. Peter Gross had previously said: “with great respect and after anxious consideration” as well as “this is not a conclusion I reach lightly but it is one to which I come without any real hesitation”²². Justice Butcher acknowledges this internal dilemma by sharing the exact wording of the passage. It is precisely at these points that the decisions of Sir Peter Gross and Justice Butcher read as if both are trying to “right a wrong” by means of another wrong that is at least less wrong than the one imposed previously by the CJEU and thus, justifiable. For this reason, both considered the possible effect of the CJEU Decision on International Arbitration to be more significant than the Decision to declare themselves unbound. It is obvious that this would result in major criticism.

¹⁸ HARTENSTEIN in: “Recht der Transportwirtschaft”, 2022, 458 para. 60-62.

¹⁹ BRIGGS in: Humpty-Dumpty, Arbitration, and the Brussels Regulation: A View from Oxford, The EAPIL Blog, <https://eapil.org/2022/06/23/humpty-dumpty-arbitration-and-the-brussels-regulation-a-view-from-oxford/> (last accessed on 17.12.2023).

²⁰ NIEHOFF in: “EuGH | Keine Geltendmachung eines Schiedsspruchs durch Anerkenntnisurteil bei Missachtung grundlegender Ziele der EuGVVO”, IWRZ 2022, 277.

²¹ Judgment, para. 177.

²² Sir Peter Gross’s First Award, para. 33.

50. Art. 89 section 1 of the Withdrawal Agreement between the UK and the EU makes it clear that judgments (including preliminary rulings) handed down after the end of the transition period are legally binding in their entirety for and in the UK. Within “The EU-UK Withdrawal Agreement explained”, a presentation by the European Commission to explain the Articles of the Agreement, the following is stated: “The CJEU’s jurisdiction for these new cases is consistent with the principle that the termination of a Treaty shall not affect any right, obligation or legal situation of the parties created prior to its termination. This ensures legal certainty and a level playing field between the EU Member States and the UK, with respect to situations occurring when the UK was under EU law obligations.”²³ The fact that preliminary rulings are generally binding was clarified by the court only a few years ago: “it is settled case-law of the Court that a judgment in which the latter gives a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings”.²⁴ According to the predominant view, the court in the main proceedings may not depart from its judgment and has no power to review, ignore or alter the content of the preliminary ruling.²⁵

51. Under the withdrawal agreement the inter-partes binding nature of preliminary decisions of the CJEU was supposed to still apply for the UK without modifications. The way Justice Butcher tries to strengthen his point about the lack of a binding nature with the UK’s withdrawal from the EU therefore lies on a shaky foundation. However, in view of the danger to the dominance of UK arbitration in the face of a CJEU decision that is also worthy of criticism, this result was at least to be expected. It seems that both courts have presumed to disregard the delicate balance between the powers granted to each other. In the end, legal certainty suffers above all with respect to both preliminary ruling procedures and the enforcement of arbitral awards.

2. Public Policy

52. Pursuant to the judgment, one of the most important grounds that the Club relied on was the public policy (“res judicata”) ground under Article 34(1) of the Jurisdiction and Enforcement Regulation. The Club contended that “enforcement would be contrary to English public policy because it would be contrary to (A) the rule as to res judicata, and (B) fundamental human rights.”²⁶ The judgment focused on discussing the res judicata ground as the second of these grounds was dealt with by another judgment.²⁷

53. In evaluating whether enforcement would be contrary to English public policy because it would be contrary to the rule as to res judicata, Justice Butcher analyzed the following three aspects: (a) Is Res Judicata a Matter of Public Policy?; (b) Can Article 34(1) be invoked if Article 34(3) is inapplicable?; and (c) Did the Club fail to assert res judicata in the Spanish proceedings?²⁸

A) Matter of public policy

54. Justice Butcher supported the Club’s argument and concluded that res judicata is a relevant public policy in England and Wales for the purposes of Article 34(1).

²³ “The revised EU-UK Withdrawal Agreement EXPLAINED”, The European Commission (Link: https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement_en, last accessed on 17.12.2023).

²⁴ CJEU, C-62/14, ECLI:EU:C:2015:400, para. 16.

²⁵ *Wegener* in: Calliess/Ruffert, 6th ed. 2022, TFEU Art. 267 para. 50.

²⁶ Judgment, para. 252.

²⁷ Judgment, para. 253.

²⁸ Judgment, paras. 258-296.

55. In analyzing whether the principle of *res judicata* is a matter of public policy in England and Wales, Justice Butcher pointed out that although the rule as to *res judicata* “has historically been given effect to by way of an estoppel” and may operate by way of an estoppel, it still represents a rule of substantive law.²⁹ He cited *Carl Zeiss Stiftung v Rayner & Keeler* [1967] 1 AC 853, *AEGIS Ltd v European Re* [2003] 1 WLR 1041, *Virgin Atlantic v Zodiac* [2014] AC 160, and *JSC ‘Aeroflot-Russian Airlines’ v Berezovsky* [2014] 1 CLC 53 in reaching this conclusion.³⁰

56. Justice Butcher further found that the doctrine of *res judicata* is a matter of public policy for the purposes of Article 34(1) of the Regulation.³¹ He pointed out *res judicata* “is a very ancient principle, which is fundamental to the functioning of the legal system” and “this is as much in relation to a *res judicata* arising from an arbitral award as one arising from a judgment.”³² He emphasized that “cause of action and issue estoppels arise out of final and binding awards established by decisions of high authority.”³³ He cited academic authorities in making his conclusion persuasive.

57. Obviously, Justice Butcher reached the conclusion based on many authorities, however, there are several problems in his judgment.

58. First, in citing *Carl Zeiss Stiftung v Rayner & Keeler* [1967] 1 AC 853 and *AEGIS Ltd v European Re* [2003] 1 WLR 1041, Justice Butcher made it clear that the doctrine of estoppel is reflected in public policy.³⁴ However, there are differences between the doctrine of estoppel and the doctrine of *res judicata*. The doctrine of *res judicata* “allows for several *res judicata* pleas, namely the plea of cause of action estoppel, issue estoppel, former recovery, or abuse of process.”³⁵ “A *res judicata* is a decision given by a judge or tribunal with jurisdiction over the cause of action and the parties, which disposes, with finality, of a matter decided so that it cannot be re-litigated by those bound by the judgment, except on appeal.”³⁶ However, an estoppel means that “where a person (A) has caused another (B) to act on the basis of a particular state of affairs, A is prevented from going back on the words or conduct which led B to act on that basis, if certain conditions are satisfied.”³⁷ Therefore, the doctrine of estoppel being part of public policy does not mean that the principle of *res judicata* is a matter of public policy.

59. Similarly, Justice Butcher pointed out that issue estoppel is recognized by the finality principle, which is important in creating legal certainty—part of public policy.³⁸ However, it should be noted that issue estoppel does not equal the principle of *res judicata*, and therefore it cannot be concluded that the principle of *res judicata* is a matter of public policy based on the theory that issue estoppel is part of public policy.

60. Third, Justice Butcher cited *Virgin Atlantic v Zodiac* [2014] AC 160, in which the court stated that *res judicata* is a rule of substantive law.³⁹ However, Justice Butcher did not explain the reason why *res judicata* represents “a rule of substantive law” leads it to be a matter of public policy. In fact,

²⁹ Judgment, para. 260.

³⁰ Judgment, paras. 261-264.

³¹ Judgment, para. 267.

³² Judgment, para. 268.

³³ Judgment, para. 269.

³⁴ Judgment, paras. 261-262.

³⁵ S. SCHAFFSTEIN, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals*, (Link: <https://oirl.ouplaw.com/display/10.1093/law/9780198715610.001.0001/law-9780198715610-chapter-2?prd=OLRL>, last accessed on 24.01.2023).

³⁶ LexisNexis, *The doctrine of res judicata—overview*, (Link: https://www.lexisnexis.com/uk/lexispsl/disputeresolution/document/393747/5M0D-5621-F18B-72CC-00000-00/The_doctrine_of_res_judicata_overview, last accessed on 24.01.2023).

³⁷ LexisNexis, *Estoppel—common law and equitable—overview*, (Link: https://www.lexisnexis.com/uk/lexispsl/disputeresolution/document/393747/5MFD-V5K1-F18B-708M-00000-00/Estoppel_common_law_and_equitable_overview#:~:text=The%20doctrine%20of%20estoppel,if%20certain%20conditions%20are%20satisfied, last accessed on 24.01.2023).

³⁸ Judgment, paras. 264-265.

³⁹ Judgment, para. 263.

“the doctrine of public policy is a truly trans-substantive doctrine in law” because “the specter of public policy hovers over a multitude of subfields of law—for instance contract law, conflict of laws, arbitration, employment law, and family law.”⁴⁰

61. Finally, Justice Butcher did not analyze Spain’s arguments about *res judicata* being not a relevant public policy for the purposes of Article 34(1).

B) The applicability of Article 34(1)

62. Justice Butcher supported the Club’s argument and concluded that Article 34(1) can be invoked on the basis of *res judicata* arising from an award if Article 34(3) is inapplicable.

a) *Res judicata* in case of court judgments

63. Justice Butcher supported Spain’s argument in relation to court judgments. Spain contended that because the consequences of *res judicata* and the effect of *res judicata* are exclusively dealt with by Article 34(3) (as well as Articles 34(4), 35 and 72) of the Regulation, and an alleged interference with principles of *res judicata* cannot be invoked as public policy under Article 34(1).⁴¹ Spain mainly relied on the statements of the ECJ in *Hoffmann v Krieg* at paragraph [21]. Spain also referred to the commentary in *Briggs on Civil Jurisdiction and judgments*.

64. The Club argued that what the ECJ was saying in paragraph [21] of *Hoffmann v Krieg* is ‘somewhat elliptical’ and that it is ‘far from clear’ what was intended.⁴² It further argued that paragraph [21] of *Hoffmann v Krieg* should have a different meaning: “[i]f Article 34(3) is satisfied, then Article 34(1) does not apply; and that it was not excluding the possibility that if a case did not fall within Article 34(3) there might nevertheless be a ground of public policy within Article 34(1).”⁴³ The Club contended that the effect of the Regulation for which Spain contends on the basis of paragraph [21] of *Hoffmann v Krieg* has no support in the text or in the objects of the Regulation, and is inconsistent with a number of authorities and commentaries.

65. Justice Butcher mainly analyzed Spain’s argument about the statements of the ECJ in paragraph [21] of *Hoffmann v Krieg*. From his understanding, ECJ was saying that “if there is an issue of compatibility with a national judgment, the question of whether there is any bar to enforceability under the Regulation is to be ... decided one way or the other, by reference to whether Article 27(3) applies, and that reference to Article 27(1) of the Convention (Article 34(1) of the Regulation) is not then permissible and is ‘precluded’.”⁴⁴ He also considered that Article 34(1) is not available when an issue falls within the scope of Article 34(3) although in some circumstances where Article 34(3) does not apply to prevent enforcement.⁴⁵

66. The Club also cited *Hendrikman v Magenta Druck & Verlag GmbH* [1997] QB 426 to support its contentions that the prohibition on reference to Article 34(1) applies only when it is found that another ground under Article 34 applies.⁴⁶ However, Justice Butcher did not support the Club’s argument.

⁴⁰ F. GHODOOSI, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 Neb. L. Rev. 685 (2015) (Link: <https://core.ac.uk/download/pdf/188101311.pdf>, last accessed on 24.01.2023).

⁴¹ Judgment, para. 271.

⁴² Judgment, para. 275.

⁴³ *Id.*

⁴⁴ Judgment, para. 276.

⁴⁵ Judgment, para. 277.

⁴⁶ Judgment, para. 278.

67. Therefore, Justice Butcher supported that the Reference has established that Spain is correct on the arguments in relation to court judgments.

68. Justice Butcher conducted a well-rounded analysis in this part. However, he did not evaluate Spain's arguments about commentary in *Briggs on Civil Jurisdiction and judgments* although he got a conclusion which was in favor of Spain.

b) *Res judicata in case of arbitral awards*

69. Justice Butcher negated Spain's argument in relation to arbitral awards.

70. The CJEU confirmed that Article 34(3) and (4) exhaustively regulated the issue of the force of res judicata acquired by a judgment previously given, thereby excluding the possibility of reliance on the public policy exception in Article 34(1).⁴⁷ Justice Butcher found that the reasoning of CJEU is binding. However, the Club also contended that even if Article 34(3) and (4) are exhaustive of the issue of the force of res judicata of a domestic judgment, they are not in relation to the effect of an arbitral award.⁴⁸

71. Justice Butcher agreed with the Club on this argument. He considered that the principle in paragraph [21] of *Hoffmann v Krieg* could be interpreted to mean that "it would be against the public policy of res judicata to permit enforcement of an incoming judgment which is inconsistent with an existing arbitration award, at least where that award was on the merits and had created a res judicata between the parties."⁴⁹ He specifically pointed out that the scope of the term "judgment" in Article 34(3) "embraces only decisions given by courts or tribunals of the justice system of a state and does not extend to awards in consensual arbitrations."⁵⁰

72. Justice Butcher further pointed out that because the Recast Regulation does not affect the application of the New York Convention, which entails that "the Recast Regulation does not require enforcement of the judgment of the courts of another Member State which is inconsistent with an award which is to be enforced under the New York Convention."⁵¹ He also believed that recognizing that a foreign judgment should not be enforced if inconsistent with a domestic arbitration award which has created a res judicata would avoid an inconsistency between the effect of New York Convention and domestic awards.⁵²

73. Moreover, Justice Butcher noticed that not all Member States have the concept of s. 66 proceedings or their equivalent and some legal systems in the EU/EEA do not include mechanism for exequatur of a domestic award. He considered that "there would be no means in such jurisdictions for a domestic award to preclude recognition of an incoming Member State judgment" if "an award did not give rise to the possibility of non-enforcement of a foreign judgment under Article 34(1)," "putting such systems at a disadvantage compared to those which did have an exequatur or s. 66-type procedure."⁵³

74. He did not consider that the authorities that Spain cited are compelling.

75. i) First, about the decision of the French Cour de Cassation in *Republic of Congo v Groupe Antoine Tabet* [2007] Rev Crit DIP 822, Justice Butcher understood that the Cor de Cassation did not

⁴⁷ Judgment, para. 282.

⁴⁸ Judgment, para. 283.

⁴⁹ Judgment, para. 284.

⁵⁰ *Id.*

⁵¹ Judgment, para. 285.

⁵² *Id.*

⁵³ Judgment, para. 286.

consider “as to whether enforcement of the foreign judgment would have been capable of being resisted by reason of the public policy exception in Article 27(1) of the Lugano Convention.”⁵⁴

76. ii) Second, about the obiter consideration in *The Wadi Sudr*, Waller LJ doubted “whether the recognition of the foreign judgment would, in those circumstances, infringe a fundamental principle of the English legal order.” Justice Butcher understood that “was not a case of a conflict of the foreign judgment with an arbitration award on the merits, creating a *res judicata*, and was thus significantly different from the present.”⁵⁵

77. Justice Butcher also found that the reasons Dr. Martin Illmer gives “as to why the Article 34(1) route to avoid this unsatisfactory result, assuming Article 34(3) is not applicable, is not available, are not persuasive, and in particular he does not consider the public policy of finality in litigation.”⁵⁶ On the contrary, he found “more persuasive the view expressed in *Raphael: The Anti-Suit Injunction* (2nd ed), para. [15.14], that ‘the prior award on the merits should still justify refusal of enforcement as a matter of public policy’.”⁵⁷ He thus concluded that “the Club could rely on the public policy of *res judicata* to resist enforcement of the Spanish Judgment as being inconsistent with the Award.”⁵⁸

78. Finally, Justice Butcher mentioned the statements in the Advocate General’s opinion and the CJEU judgment. The Advocate General’s opinion clearly contradicted Justice Butcher’s conclusion, and Justice Butcher refused to adopt their opinion because he considered that they did not consider the points which he set out above. He further considered that the CJEU judgment did not provide any binding determination of this point because it did not exactly state that “Article 34(1) would be inapplicable to *res judicata* arising from the award itself.”⁵⁹

79. As a result, Justice Butcher concluded that if Article 34(3) is not applicable in this case, Article 34(1) is applicable, by reason of the *res judicata* arising from the Schaff Award.

80. There are potentially several problems. First, the New York convention is applied to enforce the foreign arbitral awards.⁶⁰ However, Justice Butcher only mentioned the advantage of avoiding an inconsistency between the effect of New York Convention and domestic awards by recognizing that a foreign judgment should not be enforced if inconsistent with a “domestic arbitration award” which is to be enforced under the New York Convention. Second, Justice Butcher did not explain a lot about the reasons why he found Dr. Martin Illmer’s reasons unreliable and the view expressed in *Raphael: The Anti-Suit Injunction* (2nd ed) more persuasive. Finally, he reached a conclusion which is clearly different from the Advocate General’s Opinion. Although he mentioned that they did not consider some of his points, he did not explain the reasons why Advocate General’s Opinion should be changed because of his points.

C) Assertion of *res judicata*

81. Justice Butcher supported the Club’s argument and concluded that the Club did not fail to assert *res judicata* in the Spanish proceedings.

⁵⁴ Judgment, para. 287.

⁵⁵ Judgment, para. 288.

⁵⁶ Judgment, para. 289.

⁵⁷ *Id.*

⁵⁸ Judgment, para. 290.

⁵⁹ Judgment, para. 291.

⁶⁰ E. GAILLARD/B. SINO, *Enforcement under the New York Convention*, (Link: <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/enforcement-under-the-new-york-convention>, last accessed on 20.12.2023).

82. In the judgment, Justice Butcher did not recognize Spain's contention "that if there was any *res judicata* arising out of the Schaff Award or the English s. 66 judgments, it was available to the Club to seek to assert it in the Spanish courts; that it was for the election of the Club as the party armed with the *res judicata* to decide if, when and how to rely on it; and the fact that the Club chose not to rely on it in the Spanish courts meant that there was no question of an infringement of UK public policy if there was now an enforcement here of the Spanish Judgment."⁶¹

83. On the contrary, Justice Butcher found that "for at least one of several reasons, the Schaff Award and English s. 66 judgments would not have been recognised in Spain."⁶² In reaching this conclusion, he mainly relied on the witness Mr Ureña called by the Club. Spain had served expert evidence from Professor Pulido-Begines, and he and Mr Ureña had produced a Joint Expert Statement. However, since Spain chose not to call Professor Pulido-Begines in the event, it is possible that Justice Butcher missed some relevant information in making the ruling.

V. Conclusion

84. Subsequent to Brexit, it is worth noting that there can be tensions between UK courts and CJEU.⁶³ In the context of CJEU finding that the arbitration proceedings initiated by the insurer in the UK cannot block the recognition of the Spanish judgment, the tensions are clearly reflected in Justice Butcher's two main findings in this case: "(1) that the Spanish judgment is irreconcilable with the English s. 66 judgments, and (2) if that were wrong, recognition of the Spanish judgment would be contrary to principles of English public policy relating to *res judicata* by reason of the prior Schaff award." In reaching the conclusion in this complex case, Justice Butcher referred to previous judgments, awards, and academic authorities. However, this judgment still leaves room for further thought considering the reliance on an arguably shaky foundation concerning the binding nature of the CJEU Preliminary Ruling, the failure to evaluate all of Spain's arguments and lack of explanation on opposing views.

⁶¹ Judgment, para. 293.

⁶² Judgment, para. 296.

⁶³ R. HOGARTH, *Brexit and the European Court of Justice*, (Link: https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_Euro_Court_Justice_WEB.pdf, last accessed on 24.01.2024).