

Recognition of the legal effects of foreign judicial sales of ships

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Introduction

1. The fourth group of questions in the Questionnaire relates to the recognition of the legal effects of foreign judicial sales of ships. As is observed in the explanatory note to this group of questions², in many jurisdictions no legal provisions are readily available as to when and/or on what grounds conditions, a foreign judicial sale of a ship will be recognized. This is confirmed by some of the responses to the Questionnaire, which in the absence of statutory provisions or relevant case law cannot provide clear answers to some of the questions.³

Object of recognition

2. A first preliminary point made in one the responses⁴ to the Questionnaire is that it is usually not the foreign judicial sale of a ship as such which is the object of recognition, but rather a foreign court's decision or statement in which the legal fact of the change of ownership of the ship resulting from the judicial sale is reported or acknowledged.

3. In general as a matter of international law, sovereign states are not obliged to recognize the decisions of foreign courts. This may be different however where states have become party to bilateral treaties or even multilateral instruments for the recognition and enforcement of foreign decisions such as the EU Brussels-I Regulation No. 44/2001⁵ and the Lugano Convention 1988⁶, in which case the treaty/instrument in question will determine both whether there is an obligation to recognize a foreign decision and the legal consequen-

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² Questionnaire, p. 4-5.

³ See e.g. the responses from the MLA of Australia, p. 10.

⁴ See Germany, p. 11-12.

⁵ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Official Journal (OJ)* 16 January 2001 L 12/1 p. 1-23, which is binding on all 27 EU member states.

⁶ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (88/592/EEC), Lugano, 16 September 1988, *OJ* 25 November 1988 L 319, p. 9-48. A replacement convention was signed at Lugano on 30 October 2007. The Lugano Convention is binding between the 27 EU member states and Switzerland, Norway and Iceland.

ces of such recognition.⁷ In view of its importance in the relations between 27 European States and its influence beyond Europe as a model for the recognition of foreign decisions, the Brussels-I Regulation will be drawn into the discussion below of the responses to the Questionnaire as well.

4. Even in the absence of an obligation under international law, states may recognize decisions of foreign courts voluntarily in the exercise of their sovereign powers based on the principle of comity in international relations if there is reciprocity, i.e. if under similar circumstances the foreign state would recognize decisions originating from that state as well.⁸ In that case, the recognition of the foreign decision is ultimately based on the domestic laws of the state where recognition is sought.

Meaning of “recognition of legal effects”

5. A second preliminary question also raised by the response from the German MLA⁹, is what exactly is meant by “recognition of the legal effects”. Apparently, the Questionnaire presumes that recognition means that a foreign judicial sale of a ship effected in a foreign country is given *the same legal effect as a domestic judicial sale* in the country where recognition is asked.¹⁰ In this approach the legal effects of the foreign judicial sale in the country of origin are assimilated to those that a domestic judicial sale in the country of recognition would have.

6. However, an alternative approach in international procedural law understands recognition to mean that the legal effects of a foreign judicial sale in the country of origin are *extended* to the country of recognition.¹¹ In that case, the primary question is to determine

⁷ The response of the Spanish MLA, p. 1 and 3 mentions also the 1993 Maritime Liens and Mortgages Convention (MLM). Article 12.5 MLM provides that in case of a forced sale of a vessel in a state party, the registrar in another state party must recognize the certificate issued by the competent authority in the first mentioned state party that a vessel was sold free of all registered mortgages, ‘hypothèques’, or charges, except those assumed by the purchaser, and of all liens and other encumbrances.

⁸ See e.g. United States, p. 11.

⁹ See Germany, p. 12.

¹⁰ See expressly to this effect the explanatory note to the fourth group of questions of the Questionnaire, p. 5 and Question 4.1.

¹¹ Although the concept of “recognition” is not defined in the Brussels-I Regulation, the European Court of Justice has used its power to give autonomous and binding interpretations of EU law in the case of *Horst Ludwig Martin Hoffmann v. Adelheid Krieg* (Case 145/86), [1988] ECR, 645, 666, § 10 to conclude that “a foreign judgment which has been recognized by virtue of article 26 of the Convention (= article 33 Brussels-I) must in principle have the same effects in the state in which enforcement is sought as it does in the state in which the judgment was given.” This finding was based amongst others on the officially published report of the drafters of the 1968 Brussels Convention, the precursor of the Brussels-I Regulation 44/2001. See: Jenard-Report to the 1968 Brussels Convention on jurisdiction and the enforcement of

what legal effects a foreign judicial sale has under the laws of the country of origin. Recognition of legal effects then means that these legal effects are “exported” to the country of recognition.

7. As is pointed out in the response of the German MLA, the difference in approach might result in materially different results when the legal effects of a judicial sale in the country of origin are less or more far-reaching than in the country of recognition. Furthermore, it must be observed that even in the latter approach, the recognition of a foreign decision cannot lead to legal consequences which (manifestly) violate the public morals or public order in the country of recognition.¹²

Question 4.1 (a) Will a judicial sale of a ship accomplished in a foreign jurisdiction be recognized in your jurisdiction as having the same legal effects as the judicial sale of a ship accomplished in your jurisdiction?

8. It follows from the responses to the Questionnaire that in principle virtually all¹³ countries allow the foreign judicial sale of a ship to be recognized by the domestic courts, provided that the applicable requirements under the domestic law for such recognition are met. Unfortunately however, it is less clear from the responses received, which meaning “recognition of legal effects” has under these national laws. Many responses do not address the issue at all¹⁴, whereas others do so implicitly and only a few expressly.

9. Based on the responses received, it seems that a foreign judicial sale of a ship has (or may have) the same legal effects as a domestic judicial sale of a ship under the laws of Argentina¹⁵, Denmark¹⁶, France¹⁷, Norway¹⁸, Singapore¹⁹ and the United States²⁰ (assimilation

judgments in civil and commercial matters, *OJ* 1979 C 59/1, p. 43: “Recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given.” See also: Magnus/Mankowski/Wautelet, *Brussels I Regulation* (2007), Art. 33, Notes 3-6. Similarly Article 17.1 of the EU Insolvency Regulation No 1346/2000 defines the “effects of recognition” as follows: “The judgment opening the proceedings ... shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings’.

¹² Compare e.g. the refusal ground in Article 34.1 Brussels-I: “A judgment shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;”.

¹³ The exception seems to be Japan, p. 6.

¹⁴ This is the case with the responses received from the MLA’s of Australia, Belgium, Brazil, Canada, China, Italy, Malta, Nigeria, Slovenia, Spain and Venezuela.

¹⁵ See Argentina, p. 9.

¹⁶ See Denmark, p. 17.

¹⁷ See France, p. 3.

¹⁸ See Norway, p. 11.

rule). On the other hand it seems that the legal effects of the foreign judicial sale under the laws of the country of origin may be extended to the country of recognition in case of the Dominican Republic²¹, Germany²², South Africa²³ and Sweden²⁴ (extension rule). However, these results must be considered with caution because – as observed above – the Questionnaire did not specifically address this issue, and therefore it may have been overlooked or misinterpreted by some of the respondents.²⁵

Question 4.1 (b) If yes, please list the circumstance and explain the conditions for such recognition.

10. An analysis of the responses to the Questionnaire received shows that the circumstances and conditions for the recognition of foreign judicial sales vary considerably from one country to the next. Also the manner in which the responses to the Questionnaire have been drafted diverges considerably from very brief in some cases to quite elaborate or even comprehensive in others. It follows that the aim of this contribution cannot be to give a comparative overview or in-depth analysis of the prevailing requirements for recognition of judicial sales of ships.

11. Instead it will be attempted to identify trends as to the frequency and nature of requirements mentioned in the responses. In this connection it should be observed that although an individual requirement discussed below may be a *necessary* condition for recognition of a foreign judicial sale in a certain state, it does not follow that it is also a *sufficient* condition for recognition because many legal systems impose several requirements simultaneously. On a scale ranging from most to least often mentioned, the following circumstances and conditions may be listed as (possibly) relevant to the international recognition of foreign judicial sales of ships.

An application to the competent court in the country of recognition

¹⁹ See Singapore, p. 8.

²⁰ See United States, p. 11.

²¹ See the Dominican Republic, p. 8.

²² See Germany, p. 12.

²³ See South-Africa, p. 13-14.

²⁴ See Sweden, p. 9.

²⁵ It is remarkable to note that each of the groups includes two EU member states, although as explained above in footnote 11, in the autonomous and binding interpretation of the ECJ “recognition” under article 33 Brussels-I means the extension of the legal effects of the decision from the country of origin to the country of recognition.

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12. In order to obtain recognition or even approval for enforcement (Exequatur) of the foreign judicial sale in another jurisdiction, several legal systems require that the interested party should make a formal application to the competent court in the country of recognition.²⁶ Within the European Union, judgments from courts of member states shall be recognized automatically (*ipso iure*) without any special procedure being required.²⁷ However, any interested party who raises the recognition of a judgment as a principal or an incidental issue in a dispute before the court of a member state may apply for a declaratory decision that the judgment be recognized.²⁸

13. It is stressed in several of the responses that it is not within the power of a court in a country of recognition to overrule the judicial sale before a foreign court.²⁹ A reopening of the court proceedings which led to the judicial sale or reassessment of the underlying dispute between the parties is out of the question.³⁰ At best the court in the country of recognition may give or withhold recognition of the foreign judicial sale within its jurisdiction.³¹

An authentic court document evidencing the judicial sale

14. A frequently made requirement for recognition is that the foreign court which ordered the judicial sale should issue some sort of written statement in evidence of the change of ownership effected by the judicial sale.³² It is clear that the recognition process of the foreign judicial sale in other countries is greatly facilitated by such an authentic document originating from the court which presided over the judicial sale, because it will be easier for the court in the country of recognition to establish the meaning and legal effect of the court statement than to evaluate and interpret the foreign court proceedings leading up to the judicial sale.³³

Scrutiny of court proceedings leading up to the foreign judicial sale

²⁶ See Brazil, p. 5, Canada, p. 8, France, p. 3, Nigeria, p. 8, Slovenia, p. 6.

²⁷ Article 33.1 Brussels-I.

²⁸ Articles 33.2 and 33.3 Brussels-I.

²⁹ See Belgium, p. 12, France, p. 3 and Germany, p. 14

³⁰ See Belgium, p. 13, Germany, p. 14 and Malta, p. 11 ('*res judicata*').

³¹ See Germany, p. 14.

³² See Argentina, p. 9, Belgium, p. 12, Canada, p. 8, Denmark, p. 17, 15, Dominican Republic, p. 8 and Germany, p. 11.

³³ Nevertheless, it follows from the responses of the MLA's of Canada, p. 8 and Nigeria, p. 8 that in those countries details about the court proceedings leading up to the foreign judicial sale must be provided to the court before which recognition of the judicial sale is asked.

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15. The non-observance of essential procedural safeguards in the court proceedings leading up to the foreign judicial sale is often mentioned obstacle to recognition in another state. It seems that in some countries the interested party must satisfy the court that the foreign judicial sale met certain minimum standards.³⁴ More often however the breach of certain elementary principles of procedural law may be invoked as a ground for refusal of recognition.³⁵

16. This latter point is illustrated by the refusal ground in article 34.2 Brussels-I.³⁶ If the foreign judicial sale of a ship was conducted in the absence of the debtor (the ship-owner), the resulting decision may be refused recognition if the debtor was not given timely notice of the (commencement of) court proceedings through the service of documents.³⁷

17. Another ground for the refusal of recognition may be that – at least from the perspective of the court in the country of recognition – the court which ordered the judicial sale of the ship lacked proper jurisdiction to do so³⁸, e.g. because at the time of the judicial sale, the ship was not located in the country where the judicial sale took place.³⁹ Interestingly, under Brussels-I the lack of jurisdiction is no ground for the refusal of recognition of a judgment from a court from a member state.⁴⁰ However, this rather idealistic rule cannot be separated from the uniform grounds of jurisdiction given in Chapter II of the Brussels-I Regulation and the overriding principle of mutual trust in the administration of justice within the European Community⁴¹ which precludes also re-evaluation⁴² of the merits of the decision by the courts in country of recognition.

³⁴ See e.g. United States, p. 11, Canada, p. 9 (below question 4.2) and Venezuela, p. 3 (below 4.4).

³⁵ See e.g. Venezuela, p. 3 “lack of due process”. See also Denmark, p. 17, 15-16 and Norway, p. 11: failure to observe important procedural formalities in the course of the foreign judicial sale (e.g. announcement, summons/notification and distribution of proceeds) under the applicable law of the court of origin (*lex fori*).

³⁶ This provision reads as follows: I “A judgment shall not be recognised: ... 2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;”.

³⁷ Cf. Canada, p. 9, Denmark, p. 17, 15-16, Germany, p. 13, Italy, p. 8, Norway, p. 11, Sweden, p. 9, United States, p. 11 and Venezuela, p.3.

³⁸ See Denmark, p. 17, 15-16, Germany, p. 12, Italy, p. 8, Malta, p. 10, South Africa, p. 14 and the United States, p. 11.

³⁹ See: Denmark, p. 17, 15, Malta, p. 10, Norway, p. 11, Sweden, p. 9 (below 4.4).

⁴⁰ See article 35.3 Brussels-I “Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed.”

⁴¹ See consideration 16 of the Preamble to the Brussels-I Regulation No. 44/2001.

⁴² See Germany, p. 13. See also Article 36 Brussels-I “Under no circumstances may a foreign judgment be reviewed as to its substance.”

Conflicting decisions

18. Another ground to refuse recognition of a foreign judicial sale is that it is irreconcilable with another decision between the parties on the same subject matter from a court in the country of recognition⁴³ or a third country. These are also grounds of refusal under the Brussels-I Regulation.⁴⁴

Public order exception

19. Although not often expressly mentioned in the responses to the Questionnaire, it is safe to presume that no court in any country will recognize a foreign decision if it is deemed to be contrary to the public policy or public order in the country of recognition⁴⁵, e.g. if the court order for the judicial sale was obtained by fraud.⁴⁶ This refusal ground is also given under Brussels-I but only if the foreign decision is “manifestly contrary to the public policy of the member state where recognition is sought”.⁴⁷

Reciprocity in recognition

20. The recognition of the foreign judicial sale may also depend on whether there exists reciprocity in the recognition of judgments between the country of origin and the country of recognition.⁴⁸

Finality and binding force

21. A last requirement for recognition mentioned is that in order for a foreign judicial sale of a ship to be recognized, it must be legally binding and final in the sense of no longer being

⁴³ See Brazil, p. 5, Germany, p. 13, Italy, p. 8 and Venezuela, p. 3 (below 4.4). Under the law of Italy it seems that even pending court proceedings between the parties on the same subject matter may be a ground for refusal of recognition.

⁴⁴ See art. 34.3 and 34.4 Brussels-I: “A judgment shall not be recognised: ... 3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; 4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.”.

⁴⁵ See Canada, p. 9, Germany, p. 12, Italy, p. 8 and Sweden, p. 9. In the response of Brazil, p. 5 an offence against the sovereignty of Brazil as country of recognition is mentioned as a ground for refusal.

⁴⁶ See South Africa, p. 14.

⁴⁷ See article 34.1 Brussels-I.

⁴⁸ See China, p. 3. Under Brussels-I reciprocity of recognition of judgments is guaranteed between courts of the EU member states. Reciprocity is also one of the underlying principles of the rule of comity between sovereign states in international relations.

subject to appeal.⁴⁹ Under Brussels-I, the finality of a judgment is no precondition for recognition, although the fact that appeal has been lodged against the judgment in the country of origin, provides the court in the country of recognition with the discretionary power to stay the proceedings for the recognition of that judgment.⁵⁰

Question 4.2 Would a court in your country have jurisdiction over a case brought by the previous ship-owner and challenging the foreign judicial sale of a ship?

Question 4.3 Would a court in your country have jurisdiction over a case brought by the holder of a maritime lien, mortgage or other charge attached to the ship prior to the foreign judicial sale of a ship and challenging the foreign judicial sale of a ship?

22. As appears from the responses received, the largest group of MLA's has interpreted these questions to be an inquiry into their country's rules on jurisdiction and not into the likelihood that their courts would overturn a foreign judicial sale of a vessel.⁵¹ As a result a large number of responses affirms that if under these domestic jurisdiction rules, the courts of their country have personal jurisdiction over the relevant parties⁵² and/or if the disputed vessel happens to be within the jurisdiction⁵³, then the previous ship-owner or the holder of a maritime lien, mortgage or other charge attached to the ship prior to the foreign judicial sale may approach the competent court(s) in their country to challenge the foreign judicial sale of the vessel. According to a much smaller group of responses the courts in their country would decline jurisdiction on the ground that the foreign judicial sale should be challenged before the local courts in the country of origin.⁵⁴

⁴⁹ See Italy, p. 8.

⁵⁰ See: art. 37 Brussels-I "1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged. 2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the state of origin, by reason of an appeal."

⁵¹ See Canada, p. 9 and Malta, p. 11.

⁵² See Australia, p. 11, Brazil, p. 6, Canada, p. 9, China, p. 3, Denmark, p.17, Dominican Republic, p. 8, Germany, p. 13, Italy, p. 8, Japan, p. 6, Malta, p. 11, Nigeria, p. 9, Norway, p. 11, South Africa, p. 14, Singapore, p. 8, Spain, p. 3, Sweden, p. 9, United States, p. 11, Venezuela, p. 3.

⁵³ See Australia, p. 11, Canada, p. 9, China, p. 3, Germany, p. 13, Japan, p. 6, Nigeria, p. 11, Norway, p. 11, South Africa, p. 14, Singapore, p. 8, United States, p. 11, Venezuela, p. 3.

⁵⁴ See Argentina, p. 9, Belgium, p. 12 (impliedly), Brazil, p. 6, France, p. 3, Slovenia, p. 7.

Question 4.4. If the court in your country would have jurisdiction over the cases mentioned in Questions 4.2 and/or 4.3, which country's law would apply with regard to the substantive issues of the dispute?

23. As follows from many of the responses received, the conflict rules determining the applicable law may vary considerably not only from one country to the next, but also within a country depending on the substantive issue which is at stake.⁵⁵ Several legal systems apply the law of the court (lex fori country of origin) which ordered the judicial sale in relation to procedural issues surrounding the foreign judicial sale⁵⁶, although others apply basic principles of the law of the court (lex fori of the country of recognition) for the scrutiny of foreign court proceedings in relation to the recognition and enforcement of the foreign judicial sale of the ship.⁵⁷

24. With regard to the creation, transfer, extinction and priority order of property and security rights (e.g. mortgage or hypothèque) in the ship, several legal systems apply the law of the flag state of the ship⁵⁸, whereas at least one other applies the law of the country of registration of the ship where it is different from that of the flag state.⁵⁹

25. With regard to the applicable law to maritime liens there is much diversity. In one country the 1967 Convention on Maritime liens and Mortgages⁶⁰ applies, in another the 1993 Maritime Liens and Mortgages Convention⁶¹, yet another submits maritime liens to the law applicable to the secured claim⁶² and finally two others apply the law of the court (lex fori) of the country of recognition to issues (e.g. the existence and priority order) relating to maritime liens.⁶³

Question 4.5 If a ship which is entered in a register of ships in your jurisdiction is sold in a foreign jurisdiction by way of judicial sale, will the register of ships in your jurisdiction delete the registration of that ship upon notice of the fo-

⁵⁵ See Australia, p. 11, Italy, p. 8, Japan, p. 7.

⁵⁶ See China, p. 3, Canada, p. 10, Dominican Republic, p. 9, Norway, p. 12, Singapore, p. 8, Venezuela, p. 3.

⁵⁷ See Brazil, p. 6, Canada, p. 10, Denmark, p. 18, Nigeria, p. 9 (unless foreign law is pleaded), Norway, p. 12, South-Africa, p. 15, United States, p. 12.

⁵⁸ See Argentina, p. 10, Denmark, p. 18, Spain, p. 3, United States, p. 12.

⁵⁹ See Belgium, p. 14 (below 4.6) and Germany, p. 14.

⁶⁰ See Sweden, p. 9.

⁶¹ See Spain, p. 1.

⁶² Germany, p. 14

⁶³ Denmark, p. 18, United States, p. 12.

reign judicial sale or upon production by the purchaser of a document such as an order or a certificate issued by the foreign court that conducted and controlled the sale? If yes, please explain the circumstances and conditions in detail.

26. As follows from the responses to the Questionnaire received, virtually all countries require that the purchaser of a ship at a foreign judicial sale should apply to the competent local authority in the country where the ship was previously registered with appropriate documentation in evidence of the change of ownership in the ship as a result of the foreign judicial sale.⁶⁴ In a considerable number of countries, the local court in the country of registration is the appropriate authority either to order changes in the ship's register or to decide disputes about changes in the registration of the ship. In a smaller but still significant group of countries, the responsibility to effect changes in the registration is entrusted to the registrar.⁶⁵

Question 4.6 If a foreign ship were sold in a foreign jurisdiction by way of judicial sale, will a register of ships in your jurisdiction enter that ship in its registration regardless of whether the previous foreign registration has been deleted?

27. It is clear from the responses to the Questionnaire that in most countries the deletion of the previous foreign registration of the ship after a judicial sale as proven by a deletion certificate of the previous registry is a precondition to a new registration of the ship elsewhere.⁶⁶ Only a few countries allow the new registration of a vessel without a deletion certificate of the previous registry.⁶⁷

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⁶⁴ See the responses of the MLA's of Argentina, p. 10, Australia, p. 12, Belgium, p. 13, Brazil, p. 6, Canada, p. 10, China, p. 3, Denmark, p. 18, Dominican Republic, p. 8, France, p. 4, Germany, p. 15, Italy, p. 9, Malta, p. 12, Nigeria, p. 9, Norway, p. 12, South-Africa, p. 16, Singapore, p. 8, Slovenia, p. 7, Spain, p. 3, Sweden, p. 10 and United States, p. 12.

⁶⁵ See the responses of the MLA's of Brazil, p. 6, China, p. 3, Denmark, p. 18, Dominican Republic, p. 8, France, p. 4, Germany, p. 15, Malta, p. 12, Norway, p. 12-13, South Africa, p. 16, Slovenia, p. 7, Spain, p. 3 (provided that MLM 1993 applies), Sweden, p. 10 and the United States, p. 12.

⁶⁶ See the responses of the MLA's of Belgium, p. 14, Canada, p. 10, China, p. 4, Denmark, p. 18, 16, France, p. 4, Italy, p. 9, Japan, p. 7, Malta, p. 12, Nigeria, p. 10, Norway, p. 13, South Africa, p. 16, Singapore, p. 9, Slovenia, p. 7 and Sweden, p. 10.

⁶⁷ See Argentina, p. 11, Brazil, p. 6, Dominican Republic, p. 8, United States, p. 13.