

# TOWARDS UNIVERSAL RECOGNITION OF FOREIGN JUDICIAL SALES OF SHIPS?

A critical analysis of the Draft CMI Instrument from the perspective of EU Regulation 44/2011 (“Brussels-I”) on the recognition of judgments

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## Introduction

1. In the absence of a mechanism for the worldwide recognition of foreign judicial decisions, the CMI Instrument, now in its second draft, aims at achieving the international recognition of Foreign Judicial Sales of Ships. At present, such recognition depends on the existence of bilateral treaties or multilateral instruments on recognition or enforcement of foreign judicial decisions between the state of origin where the judicial sale was held and the state where recognition of this judicial sale is asked. Failing such binding obligations under international law, courts may also use their discretion to recognize foreign judicial sales of ships also under the principle of comity in international relations, provided there is reciprocity.<sup>2</sup>

2. Nevertheless, the current situation leaves room for legal uncertainty and a purchaser of a ship at a judicial sale might very well be confronted later in other jurisdictions with a ship arrest from e.g. the dispossessed previous shipowner himself or from his creditors (still) pretending to exercise maritime liens over the ship. It goes without saying that uncertainty about the legal protection of the purchaser of a ship at a judicial sale in foreign jurisdictions will adversely affect the amount of sale proceeds that can be achieved for a ship at a judicial sale. Therefore to increase the international recognition of foreign judicial sales helps to maximize the realisation of the financial value represented by the ship at a judicial sale. Of course, this is not only in the interest of the purchaser at the judicial sale who has greater legal certainty, but also of the creditors of the previous shipowners who will recover a large proportion of their claim from the sale proceeds and ultimately also the previous shipowner himself whose remaining debt total after the judicial sale will be decreased.

3. The above logic was not lost on the CMI International Working Group (IWG) under the presidency of Professor Henry Hai Li, as follows from the commentary on the 2<sup>nd</sup> draft of the

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<sup>2</sup> See Smeele, ‘Recognition of the legal effects of foreign judicial sales of ships’, *CMI Yearbook* 2010, p. 225-226.

new instrument.<sup>3</sup> The draft Instrument's main objective is to foster the legal protection of purchasers of ships at judicial sales by furthering the international recognition of foreign judicial sales.<sup>4</sup> In its work the IWG was guided by the following basic principles:

- a: certain necessary minimal requirements should be set for conducting judicial sales<sup>5</sup>;
- b: the object of recognition, i.e. some basic legal effects of judicial sales, should uniformly be provided for in the instrument<sup>6</sup>;
- c: there should only be very limited grounds of refusal with the burden of proof on the party challenging recognition of the foreign judicial sale<sup>7</sup>;
- d: the remedies available to challenge a foreign judicial sale should be curtailed<sup>8</sup>;
- e: ships purchased at a judicial sale should be immune from arrest for claims arising earlier than the judicial sale<sup>9</sup>;
- f: (exclusive) jurisdiction of the courts of the state where the judicial sale took place over any actions to challenge the regularity, validity or effectiveness of the judicial sale<sup>10</sup>;
- g: conflicts with other international instruments<sup>11</sup> should be avoided.

#### Outline

4. In this paper, the approach of the CMI IWG in the draft instrument to further the international recognition of foreign judicial sales of ships will be analysed critically and compared and contrasted with that of the (as appendix 1 attached) European *Council Regulation (EC) no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels-I)*.<sup>12</sup> As this European regulation and its predecessors have proved remarkably successful in attaining the objective of free movement of judgments in civil and commercial matters within Europe, Brussels-I provides a useful example from which important lessons may be drawn for the subject project to promote the recognition of foreign judicial sales of ships worldwide.

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<sup>3</sup> CMI IWG, *Commentary on the 2nd draft of the Instrument on international Recognition of Foreign Judicial Sales of Ships*, 2012, p. 1.

<sup>4</sup> CMI IWG, *Commentary on the 2nd draft*, 2012, p. 1, No. 3.

<sup>5</sup> CMI IWG, *Commentary on the 2nd draft*, 2012, p. 1, No. 1.

<sup>6</sup> CMI IWG, *Commentary on the 2nd draft*, 2012, p. 1, No. 2.

<sup>7</sup> CMI IWG, *Commentary on the 2nd draft*, 2012, p. 1, No. 4.

<sup>8</sup> CMI IWG, *Commentary on the 2nd draft*, 2012, p. 1, No. 5-7.

<sup>9</sup> CMI IWG, *Commentary on the 2nd draft*, 2012, p. 1, No. 5.

<sup>10</sup> CMI IWG, *Commentary on the 2nd draft*, 2012, p. 1-2, No. 7.

<sup>11</sup> In particular the Maritime Liens and Mortgages Conventions of 1926, 1967 and 1993 and the Arrest Conventions of 1952 and 1999, CMI IWG, *Commentary on the 2nd draft*, 2012, p. 2, No. 8.

<sup>12</sup> Official Journal (OJ) No. L 012, 16/01/2001, p. 1-23.

5. To provide some background with regard to Brussels-I especially for non-European readers, below first its origins and general structure will briefly be described. Next the essential elements in the system for recognition of foreign judicial decisions in Brussels-I and in that for the recognition of foreign judicial sales under the draft instrument will be analysed and compared and the resulting differences will be submitted to a critical evaluation followed by a few concluding remarks.

### Origins of Brussels-I

6. The Brussels-I Regulation 44/2001 is the most recent step in a development of over fifty years towards a multilateral system for jurisdiction and recognition and enforcement of judicial decisions in civil and commercial matters, which at present extends to 30 sovereign states in Europe.<sup>13</sup> It all started with the institution of a committee of experts in 1960 by the then six member states<sup>14</sup> of the European Economic Community (EEC).<sup>15</sup> The draft Convention completed in 1964 formed the basis for the Brussels Convention of 27 September 1968, which was revised following each subsequent enlargement of the membership of the European Community in 1978<sup>16</sup>, 1982<sup>17</sup>, 1989<sup>18</sup>, 1996<sup>19</sup> and which also served as model for the 1988 Lugano Convention<sup>20</sup> between the European Community and the members of the European Free Trade Association (EFTA), which in 2007 was revised to align it with the Brussels-I Regulation. As from a Protocol to the Brussels Convention of 1971, the European Court of Justice (ECJ) is charged with the task of giving its authentic interpretation of the Brussels Convention and its successors by answering preliminary questions raised by national courts in member states.

7. A serious drawback of the repeated revisions of the Brussels Convention of 1968 was that each of the accession treaties required ratification by an ever-increasing number of member

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<sup>13</sup> Brussels-I applies to all 27 EU member states, although in the case of Denmark, this follows from a separate treaty (OJ 2005 L 299/62). The 2007 Lugano Convention which is based on the Brussels-I regulation applies in the relation between the 27 EU-member states and 3 non-EU member states, Iceland, Norway and Switzerland.

<sup>14</sup> I.e. Belgium, France, Germany, Italy, Luxemburg and The Netherlands.

<sup>15</sup> For further details see: Ulrich Magnus and Peter Mankowski (eds.), *Brussels I Regulation*, 2nd Revised Edition, European Commentaries on Private International Law, Sellier, 2012, p. 14 ff.

<sup>16</sup> Accession Convention of 9 October 1978 to the Brussels Convention, following the accession of Denmark, Ireland and United Kingdom in 1973.

<sup>17</sup> Accession Convention of 25 October 1982, following the accession of Greece in 1981.

<sup>18</sup> Accession Convention of 26 May 1989, following the accession of Spain and Portugal in 1986.

<sup>19</sup> Accession Convention of 29 November 1996, following the accession of Austria, Finland and Sweden in 1995.

<sup>20</sup> Convention on jurisdiction and the enforcement of judgments. in civil and commercial matters, Lugano, 17 September 1998.

states of the European Union (as it was now called), which created “troubling disharmony instead of the intended unification”<sup>21</sup>. Partly for this reason as from 2001 onwards the Brussels Convention was replaced by the directly applicable Brussels-I Regulation 44/2001. At present, a proposal of the European Commission is under consideration to review the Brussels-I regulation.<sup>22</sup>

### General Structure of Brussels-I

8. Like other European Union Regulations, the text of Brussels-I starts with a long list of considerations (29 ‘recitals’ in all) in which significant intentions of the legislator and fundamental principles or considerations behind the regulation are expressed. The recitals are followed by the main text of the Brussels-I regulation which is divided in eight chapters, of which the most relevant for our present purposes are: chapter I ‘scope’, chapter II ‘Jurisdiction’, chapter III ‘Recognition and enforcement of judgments’ and chapter IV ‘Authentic Instruments and Court Settlements’.<sup>23</sup>

9. The basic structure of Brussels-I is that firstly it must be established whether the subject matter of a claim or a court judgment falls within the material scope of application of Brussels-I, i.e. “civil and commercial matters whatever the nature of the court or tribunal”.<sup>24</sup> Second, if that is so, then for the application of chapter II on Jurisdiction a further formal scope requirement must be met, i.e. the defendant must be domiciled on the territory of an EU member state<sup>25</sup> or alternatively in case of an agreement to confer exclusive jurisdiction upon a court of a member state<sup>26</sup>, at least one of the parties to the choice of jurisdiction must be domiciled on the territory of an EU member state. Third, if Brussels-I is applicable, then articles 2 to 30 inclusive Brussels-I provide a comprehensive system of jurisdiction to the exclusion of the domestic jurisdiction rules of the member states. The jurisdiction chapter in Brussels-I consists of various sets of jurisdiction grounds<sup>27</sup>, rules on examination of jurisdiction<sup>28</sup>, *lis pendens* and related actions<sup>29</sup> and provisional including protective measures.<sup>30</sup>

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<sup>21</sup> Magnus and Mankowski (eds.), *Brussels-I Regulation*, 2nd ed., 2012, p. 14, § 16.

<sup>22</sup> European Commission, Proposal for a Regulation of the European parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final.

<sup>23</sup> The others are chapter I ‘Scope’, chapter V ‘General provisions’, chapter VI ‘Transitional provisions’, chapter VII ‘Relations with other instruments’ and chapter VIII ‘Final Provisions’.

<sup>24</sup> Article 1 Brussels-I. Specifically excluded are (amongst others) “revenue, customs and administrative matters” (article 1-1), “bankruptcy” (article 1-2 (b) and “arbitration” (article 1-2(d) Brussels-I).

<sup>25</sup> Article 4 Brussels-I.

<sup>26</sup> Article 23 Brussels-I.

<sup>27</sup> Articles 2, 5 to 24 inclusive Brussels-I. These jurisdiction rules in Brussels-I are divided between jurisdiction grounds of general application (articles 2, 5, 6, 7, 23 and 24), jurisdiction rules for specific legal rela-

10. Fourth, Brussels-I provides a system of rules for the recognition<sup>31</sup> and enforcement<sup>32</sup> of judgments<sup>33</sup> of courts in EU member states and of authentic instruments and court settlements<sup>34</sup>. The basic idea is that judgments in civil and commercial matters originating from courts in EU member states should be recognized as easily<sup>35</sup> within another EU member state as if these had been given by a another court in the same member state. With regard to enforcement of foreign judgments and authentic instruments, the intervention of the local court is required before it can be enforced there.<sup>36</sup>

11. Recognition and enforcement of foreign judgments under Brussels-I is a more or less automatic process with only a small and exhaustive list of refusal grounds<sup>37</sup>, a general prohibition to review the foreign judgment as to its substance<sup>38</sup> and (with the exception of a violation of the exclusive jurisdiction grounds<sup>39</sup>) a prohibition to review the jurisdiction of the foreign court which gave the judgment.<sup>40</sup>

12. As it would go way beyond the scope of this contribution to go into a detailed article-by article analysis of the 76 articles of the Brussels-I regulation, below on a theme-by-theme basis a selection of the abovementioned recitals and a selection of the provisions on recognition of foreign judgments from Brussels-I will be analysed and reviewed for their relevance to the CMI Draft Instrument.

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28 tions, i.e. insurance matters (articles 8 to 14 inclusive), consumer (articles 15 to 17 inclusive) and employment contracts (articles 18 to 21 inclusive), and finally exclusive jurisdiction grounds (art. 22).

Articles 25 and 26 Brussels-I.

29 Articles 27 to 30 inclusive Brussels-I.

30 Article 31 Brussels-I.

31 Chapter III, Section 1, articles 33 to 37 inclusive and Section 3, articles 53 to 56 inclusive Brussels-I.

32 Chapter III, Section 2, articles 38 to 52 inclusive and Section 3, articles 53 to 56 inclusive Brussels-I.

33 Article 32 Brussels-I gives a wide definition of judgments capable of recognition and enforcement: "For the purposes of this Regulation, judgment means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.". See however articles 37 and 46 Brussels-I regarding the effect of an appeal being lodged or being open against the judgment.

34 Chapter IV, articles 57 and 58 Brussels-I.

35 Article 33 speaks of "without any special procedure being required".

36 Articles 38 to 42 inclusive Brussels-I. This prohibition implies that the court addressed may not question the validity of the original decision, nor review the substantive or legal soundness of the conclusions drawn by the foreign court nor scrutinise whether the court of origin applied its conflict rules correctly to arrive at the applicable law nor whether it construed the applicable law correctly nor whether it applied its procedural rules correctly. See more extensively: Magnus and Mankowski, *Brussels-I Regulation*, 2<sup>nd</sup> ed., 2012, p. 722, § 6-8.

37 See articles 34 and 35 Brussels-I. See also articles 41 and 45 Brussels-I from which it follows that in case of enforcement of a foreign judgment the refusal grounds may only be invoked in appeal once the foreign judgment has been declared enforceable.

38 Articles 36 and 45-2 Brussels-I.

39 Article 35-1 Brussels-I.

40 Article 35-3 Brussels-I.

### Free movement of judgments

13. For the European Union (EU), Brussels-I is an important instrument to pursue its fundamental objective of “free movement of judgments” within the European Community. The EU is not merely a common market, but defines itself (also) as an area of freedom, security and justice in which the free movement of persons is ensured.<sup>41</sup> In such an area the recognition of e.g. a decision of the Tribunal de commerce of Rouen, France should in principle be recognized by the court of Rotterdam in The Netherlands as easily, as a judgment of say the court in Amsterdam. However, even under Brussels-I this is not a reality in Europe yet. National barriers of a procedural nature still exist between the European member states<sup>42</sup> (e.g. the requirement of and the main aim of Brussels-I and its predecessors was to lower and ultimately eliminate these barriers and to promote the recognition and enforcement of foreign judgments.

14. This presupposes of course that there exists mutual trust in the administration of justice between member states of the EU.<sup>43</sup> The European Court of Justice (ECJ) has stressed repeatedly that the principle of trust in each other’s legal systems and judicial institutions underpins the Brussels-I regulation<sup>44</sup> and has refused to allow courts in one member state to issue anti-suit injunctions aimed at the termination of court proceedings in another member state.<sup>45</sup> Neither shall courts in EU member states review the substance of the decisions reached by courts in other member states.<sup>46</sup>

15. If we turn now to the proposed CMI instrument it is probably far too ambitious to presume the existence of mutual trust in the administration of justice as the basis for worldwide recognition of foreign judicial sales of ships. That is not to say that courts in some countries may not have faith in courts from certain other countries, merely that it does not follow that they will trust every court in every state that in the hypothetical becomes party to the instrument in due course.

16. However another basis for such recognition might perhaps be found in the fact that legal systems and courts tend to be geared towards preservation of the status quo and generally require a good reason in law before allowing a party to effect a change in the status quo,

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<sup>41</sup> See recital (1) to Brussels-I.

<sup>42</sup> See e.g. the requirement in art. 38 Brussels-I to obtain a declaration that a foreign judgment is enforceable from the court or competent authority in the country of enforcement.

<sup>43</sup> Recital (16) to Brussels-I.

<sup>44</sup> *Gasser* (Case-116/02), ECR [2003] I-14693, § 72.

<sup>45</sup> *Turner v. Grovit* (C-159/02), [2004] ECR I-3565, § 24 and *West Tankers* (C-185/07), § 30.

<sup>46</sup> Article 36 Brussels-I states: “Under no circumstances may a foreign judgment be reviewed as to its substance.”

e.g. a change of ownership as a result of a judicial sale of a ship. If a court in a foreign state has authorized a judicial sale of a ship, this creates a “fait accompli” which courts in other countries cannot simply ignore if later a party comes forward to arrest the ship and challenge the title to it of the purchaser at the judicial sale.

17. Furthermore, the courts involved both in the judicial sale and in the challenges to the purchaser’s title to the ship tend to be maritime or commercial courts in whose area the port, a major maritime center or the ship’s register is/are located. This may make it easier for the relevant courts to accept that the needs of the global maritime industry and ship finance simply dictate that maritime courts around the world should co-operate with similar courts in other parts of the world on the basis of mutual trust and reciprocity and recognize each other’s judicial sales of ships at least in principle.

18. Clearly, this logic can be extended further to ship’s registers whether or not these are kept by the (maritime) court or by a separate institution. If courts should recognize foreign judicial sales then ship’s registers also. After all, ship registration is not an end in itself but rather a means to the ends of facilitating ship finance and protecting the rights of owners, mortgagees and third-parties.

#### **Legal effects of recognition**

19. Although Brussels-I does not define the legal effects of recognition, it is sufficiently clear from the case law of the ECJ that “a foreign judgment which has been recognized ... 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.”<sup>47</sup> This implies that as a result of recognition the legal effects that a foreign court judgment has in its country of origin are extended to the country of recognition.

20. In articles 4 to 8 the legal effects of recognition of a foreign judicial sale under the draft instrument are spelled out in detail for each of the groups of affected persons and institutions. Article 4 addresses the position of the parties with a property or security interest in the ship, article 5 is directed at the court under whose authority the judicial sale took place, article 6 is directed at the Registrar of the Ship’s Registry where the ship was registered prior to the judicial sale and articles 7 and 8 address the court in the country of recognition. For these rules to apply, the judicial sale must have taken place in the presence of the

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<sup>47</sup> *Hoffman v. Krieg* (C-145/86) [1988] ECR 645, 666, § 10. See also Smeele, *CMI Yearbook* 2010, p. 226, footnote 11.

ship and in accordance with the laws of the state where the sale is executed as well as with the provisions of the draft instrument.<sup>48</sup>

21. In article 4 the effect of a judicial sale under the draft instrument upon the position of the previous owner, his secured creditors and the purchaser of the ship is given. The objective of the drafters is clear, i.e. that the purchaser of a ship at a judicial sale shall acquire “clean title” to the ship<sup>49</sup> and that “all rights and interests in the ship existing prior to its judicial sale shall be extinguished and all mortgages, “hypothèques” or charges, except those assumed by the purchaser, all maritime and other liens, and all encumbrances of whatsoever nature shall cease to attach to the ship”. Any obligations resting upon the previous shipowner *in personam* are not affected by the judicial sale.<sup>50</sup>

22. In order to facilitate the recognition of judicial sales of the ships in foreign countries by courts<sup>51</sup> and Ship Registries<sup>52</sup> alike, article 5 provides that the court under whose authority the judicial sale was executed, shall issue – at the purchaser’s request – a certificate<sup>53</sup> confirming basically (a) the date of the judicial sale, (b) that all the requirements applicable to the judicial sale under the law of the court (*lex fori*) and the draft instrument have been met, (c) that the ship was sold to the purchaser free of all security rights<sup>54</sup> except those assumed by himself. Brussels-I imposes a similar obligation upon the court which gave the judgment.<sup>55</sup>

23. The most significant formal requirement imposed by the Draft Instrument itself is the requirement that the court under whose authority the judicial sale takes place<sup>56</sup> shall ensure that at least 30 days notice in writing<sup>57</sup> of the judicial sale is given in advance to all interested parties.<sup>58</sup> Failure to observe this requirement implies, may bar<sup>59</sup> the purchaser from acquiring clean title to the ship, may also bar him from obtaining the certificate<sup>60</sup> but does not give

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<sup>48</sup> Article 4 sub (a) and (b) Draft Instrument.

<sup>49</sup> Article 1-7 Draft Instrument.

<sup>50</sup> Article 4 Draft Instrument.

<sup>51</sup> See article 7-1 Draft Instrument.

<sup>52</sup> See article 6-1 Draft Instrument.

<sup>53</sup> Defined in art. 1-1 Draft Instrument as: “the original duly authorized certificate, or a certified copy thereof, provided in terms of article 5”.

<sup>54</sup> Article 5 specifically mentions: “free of all mortgages, “hypothèques” or charges except those assumed by the purchaser, of all maritime and other liens and of all encumbrances of whatsoever nature”.

<sup>55</sup> Article 54 Brussels-I.

<sup>56</sup> Article 3-1 Draft Instrument.

<sup>57</sup> Article 3-3 Draft Instrument.

<sup>58</sup> Article 3-1 Draft Instrument.

<sup>59</sup> Article 4 (b) Draft instrument makes the legal effects of a judicial sale conditional upon “the sale having been conducted in accordance with ... the provisions of this instrument.”

<sup>60</sup> Also article 5 Draft Instrument makes the obligation of the court to issue a certificate conditional upon “the conditions required ... by this Instrument ... (having) been met”.



rise to a refusal ground for recognition<sup>61</sup>, although it may be invoked in order to challenge the judicial sale before the courts of the state where this sale was conducted.<sup>62</sup>

24. Very welcome is also the clarification in article 6 Draft Instrument of the position of the Ship's registrar, who upon presentation of the certificate or a duly certified copy (and/or duly certified translation thereof<sup>63</sup>) is bound to delete all entries with regard to the ship that antedate the judicial sale, who is obliged to obey the orders of the purchaser with regard to de- or reregistration of the ship, but who may suspend his obligations in this regard if he receives notice of court proceedings from an interested person<sup>64</sup> protesting the judicial sale of the ship.<sup>65</sup>

25. The most significant legal consequences of a judicial sale under the draft instrument are given in article 7 which is aimed at the court in the country of recognition. Article 7-1 repeats the legal consequences of article 4 which become binding upon the court of recognition after presentation of the certificate meant in article 5. From that moment onwards, the ship becomes immune from arrest for claims which arose prior to the judicial sale.<sup>66</sup> It is further regulated *who*<sup>67</sup> may challenge the judicial sale, *before* which courts<sup>68</sup>, how the burden of proof in such an action is to be divided and what the applicable time-bar<sup>69</sup> (one year from the date of the judicial sale) is.

26. The exhaustive list of four grounds acknowledged in the draft instrument to justify the refusal of recognition of a foreign judicial sale, are stated in article 8 and include: (a) the physical absence of the ship that was sold from the jurisdiction area of the court by whose authority the sale took place<sup>70</sup>; (b) the fact that a challenge of the judicial sale is underway before the courts of the state where the judicial sale took place<sup>71</sup>; (c) the fact that the certi-

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<sup>61</sup> See art. 8 Draft Instrument.

<sup>62</sup> Article 7-3 and 7-4 Draft Instrument.

<sup>63</sup> Article 6-2 Draft Instrument.

<sup>64</sup> Defined in article 1-6 Draft Instrument as "the owner of a ship prior to its Judicial Sale or the holder of a mortgage, "hypothèque", charge or maritime lien attached to the ship prior to its Judicial Sale."

<sup>65</sup> Article 6-4 Draft Instrument.

<sup>66</sup> Article 7-2 Draft Instrument.

<sup>67</sup> I.e. an "interested person" as defined in article 1-6, see article 7-5 Draft Instrument, to the exclusion of all other persons.

<sup>68</sup> I.e. the competent courts in the state where the judicial sale took place, to the exclusion of the courts in all other countries, article 7-3 Draft Instrument and provided that the claimant is an Interested person in the sense of article 1-6, failing which no court shall have jurisdiction to hear the challenge of the judicial sale, article 7-5 Draft Instrument.

<sup>69</sup> Article 8-1 second and third sentence Draft Instrument.

<sup>70</sup> Article 8-1 (a) Draft Instrument.

<sup>71</sup> Article 8-1 (a) jo 7-3 Draft Instrument.

ificate produced by the (subsequent) purchaser is not authentic<sup>72</sup>; and finally (d) if recognition of the foreign judicial sale is considered by the court to be contrary to the public policy of the State of recognition.<sup>73</sup>

### **Eliminating and curtailing refusal grounds**

27. One of the key success factors of Brussels-I and its predecessors has been the elimination and curtailing of refusal grounds that otherwise might be invoked to deny recognition and enforcement to foreign judgments. Although the Draft Instrument allows only four refusal grounds, it will be shown below by the example of Brussels-I that further improvements can be made to ensure that the main objective of the draft instrument, i.e. the recognition of foreign judicial sales of ships, is not frustrated through a too wide interpretation of the few refusal grounds.

28. Brussels-I and its predecessors have succeeded in to a large extent eliminating 'lack of jurisdiction' as an important refusal ground with regard to the recognition of foreign court decisions. Except for a few cases<sup>74</sup>, courts in member states are simply barred from reviewing the jurisdiction of the court of the Member state of origin.<sup>75</sup> Neither is it permitted to invoke lack of jurisdiction 'through the backdoor' as a (contributing) factor why recognition of the foreign decision would be "manifestly contrary to public policy".<sup>76</sup> This remarkable feat has been achieved thanks to the inclusion into the 1968 Brussels Convention and its successors of a comprehensive system of jurisdiction rules (see above in § 9).

### **Lack of Jurisdiction**

29. In my view, there is no need in the subject draft instrument for a comprehensive, Brussels-I style, jurisdictional system. The draft instrument only wishes to apply to judicial sales taking place in the presence of the ship that is to be sold.<sup>77</sup> In that case it seems hard to argue that despite the ship's presence within its area of jurisdiction, the court was wrong to assume jurisdiction with regard to the judicial sale.

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<sup>72</sup> Article 8-1 (c) jo article 5 Draft Instrument.

<sup>73</sup> Article 8-2 Draft Instrument.

<sup>74</sup> Article 35-3 jo 35-1 Brussels-I retains the possibility to deny recognition and enforcement to a judgment of a court which accepted jurisdiction in violation of the mandatory set of jurisdiction rules in sections 3, (insurance matters), 4 (consumer contracts), and 6 (exclusive jurisdiction) and the case of article 72 Brussels-I.

<sup>75</sup> Article 35-3 Brussels-I.

<sup>76</sup> Article 34-1 Brussels-I.

<sup>77</sup> See article

30. Nevertheless it seems advisable to include into the Draft Instrument, a provision similar to that in Brussels-I to the effect, (a) that the jurisdiction of the court under whose authority the judicial sale was conducted, may not be reviewed, and (b) that the public policy exception in art. 8-2 Draft Instrument may not be based on the (alleged lack of) jurisdiction of the court conducting the judicial sale.

31. Similarly it seems advisable to follow the example of Brussels-I and to expressly provide in the Draft Instrument that “under no circumstances may a foreign judicial sale be reviewed as to its substance.”<sup>78</sup> That substance is the main object of recognition and the few refusal grounds which may be raised in order to resist recognition of the foreign judicial sale relate to certain procedural and formal safeguards<sup>79</sup> upon which recognition has been made conditional in the Draft Instrument.

#### **Public policy exception**

32. Finally, it seems advisable for the Draft Instrument to not forget “to close the back-door”, i.e. to narrow down the public policy exception in article 8-2 Draft Instrument as much as possible in order to prevent courts in other states to use this open norm as a way to review the substance of the matter after all.

33. Again, the Brussels-I regulation provides a useful model by requiring in article 34-1 Brussels-I that “a judgment shall not be recognized: 1. If such recognition is *manifestly contrary* to public policy in the Member state in which recognition is sought” (with added stress-FS). In the interpretation of the ECJ the public policy exception of article 34-1 Brussels-I may only be invoked in case a “fundamental principle within the legal order” of the state of recognition is likely to be infringed if recognition or enforcement takes place.<sup>80</sup>

34. Furthermore the use of the word “manifestly” implies that the infringement upon the fundamental right must be substantial enough to justify the refusal of recognition of the foreign judgment. In a case where the court refused to hear the defence of an accused person who was not present at the hearing the ECJ held that this constitutes a manifest breach of a fundamental right”.<sup>81</sup>

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<sup>78</sup> Compare article 36 Brussels-I.

<sup>79</sup> Article 8-1 Draft Instrument.

<sup>80</sup> ECJ 28 April 2009 (C-420/07), (2009) ECR I-3571, *Apostolides v. Orams*, § 61.

<sup>81</sup> ECJ 28 March 2000 (C-7/98), ECR I-1935, § 40 *Krombach v. Bamberski*. See also: ECJ 2 April 2009 (C-394/07), ECR I-2563, § 29 *Gambazzi*.

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35. It is therefore submitted that the wording of article 8-2 Draft Instrument may be made more stringent by rephrasing it as follows: “recognition of a judicial sale may also be refused if such recognition is manifestly contrary to public policy in the state party where recognition is sought.”

**Attachment:** Brussels-I Regulation 44/2001

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