Recognition of Foreign Judgments

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Recognition of Foreign Judgments

With A Special Focus on Maritime Judgments

Erkenning van buitenlandse vonnissen
met bijzondere aandacht voor maritieme vonnissen

THESIS

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Yuhan Ji

Born in Bengbu, Anhui, China

Erasmus University Rotterdam

Assessment Committee

Promotor:	Prof. dr. F.G.M. Smeele
Other members:	Prof. dr. X. Kramer
	Prof. dr. G.J. Meijer
	Prof. dr. P. Mankowski †

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Table of Abbreviations

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1957 Brussels	International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships 1957
1976 LLMC	Convention on Limitation of Liability for Maritime Claims 1976
1992 CLC	International Convention on liability on Civil Liability for Oil Pollution Damage 1969 as amended by the 1992 Protocol
1993 MLM	International Convention on Maritime Liens and Mortgages 1993
1996 LLMC	Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims 1976
A L R Fed	American Law Reports Federal
AC	Appeal Cases
AD	Appellate Division Reports
ALI	American Law Institute
All ER	The All England Law Reports
Am J Comp L	American Journal of Comparative Law
Am Rep	American Law Reports
AMC	American Maritime Cases
Appalachian J L	Appalachian Journal of Law
BCWLD	British Columbia Weekly Law Digest
BIICL	British Institute of International and Comparative Law
Buff L Rev	Buffalo Law Review
CA	Court of Appeal
CBNS	Common Bench Reports
Ch	Chancery
CLC	Commercial Law Cases
CMI	Comité Maritime International
CMLR	Common Market Law Reports
Colum L Rev	Columbia Law Review
Comm	Commercial Division
CPR	Civil Procedure Rule
E D La	Eastern District of Louisiana
ECC	European Commercial Cases
ECJ	European Court of Justice

ECR	European Court Reports
EEC	European Economic Community
EFTA	European Free Trade Association states
ER	English Reports
EU	European Union
EWCA Civ	England and Wales Court of Appeal judgments Civil Division
EWHC	England and Wales High Court
F Cas	Federal Cases
F Supp	Federal Supplement
FSR	Fleet Street Reports
Geo L J	Georgetown Law Journal
Harv Int'l LJ	Harvard International Law Journal
Harv L Rev	Harvard Law Review
HL	The House of Lords
Hous L Rev	Houston Law Review
ICR	Industrial Cases Reports
ILPr	Law Report, International Litigation Procedure
IMO	International Maritime Organization
Ind L J	Indiana Law Journal
Int'l & Comp LQ/ICLQ	The International and Comparative Law Quarterly
Iowa L Rev	Iowa Law Review
IPRax	Praxis des intemationalen Privat- und Verfahrensrechts
L Ed	Lawyer's Edition
La L Rev	Louisiana Law Review
Lloyd's Rep	Lloyd's Law Reports
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LQR	Law Quarterly Review
Mich L Rev	Michigan Law Review
N C L Rev	North Carolina Law Review
N Y L Sch L Rev	New York Law School Law Review
New Eng L Rev	New England Law Review
NJ	Nederlandse Jurisprudentie
NJW	Neue Juristische Wochenschrift
NTHR	Nederlands Tijdschrift voor Handelsrecht
NYS	New York State Law Reports
NYU J Int'l L & Pol	New York University Journal of International Law and Politics
PD	Probate and Divorce Cases
QBD	Queen's Bench Division

Rutgers U L Rev	Rutgers University Law Review
SCC	Canada Supreme Court Cases
SCR	Canada Supreme Court Reports
SDNY	Southern District of New York
St John's L Rev	St John's law review
Stan L Rev	Stanford law review
Tex L Rev	Texas Law Review
UKPC	United Kingdom Privy Council
UNCITRAL	United Nations Commission on International Trade Law
US	United States Reports
USC	United States Code
USLW	United States Law Week
USPQ	United States Patents Quarterly
UNCLOS	United Nation Convention on the Law of the Sea
WLR	The Weekly Law Reports
WLUK	Westlaw United Kingdom

1 Introduction

1.1 Introduction

In the landscape of international private law, the need for recognition of foreign judgments comes after the notion of territorial sovereignty.[1] There was a time when there was no difference between foreign and domestic judgments.[2] However, with the spread of the notion of territorial sovereignty, increasingly foreign judgments were considered more as governmental acts rather than as a resolution of private disputes.[3] Therefore, a judgment from one state had no force in another.[4] With more and more transnational disputes arising in this era of globalization, if the binding effect of a judgment were only applicable within the borders of a single state, this would not be only unsatisfactory for the parties who have an interest in legal certainty and in avoiding repetitive suits and conflicting decisions, but also against the interest of the general public which requires that judicial resources are used efficiently and internationally harmonious decisions are achieved.[5] Based on these considerations, national, bilateral, and multilateral efforts have been made to pave the way for the granting of binding effect to foreign judgments. Accordingly, the topic of recognition and enforcement of foreign judgments has become one of the main points of focus of private international law in recent years.

In the European Union (EU), England and Wales and the United States (US), the rules on recognition and enforcement of foreign judgments are continuously developing and have been codified to a large extent. While judicial cooperation is enhanced by these rules, the prevalence of the rules and practice on recognition and enforcement of foreign judgments leads to two main disadvantages:

First, it unintentionally limits the breadth of the understanding of the concept of recognizing foreign judgments in transnational litigation. Specifically, by putting too much emphasis on the final goal of enforcement of foreign judgments, the dividing line between the concept of recognition and the concept of enforcement becomes obscure. Gradually, the extent to which people expect the mechanism of recognition of foreign judgments to produce an independent effect is reduced. This has led to the negative perception that

1 Juenger (1988) p.5.

2 Ibid. 6. It is stated that, "the medieval revival of Roman law and the idea of a Holy Roman Empire favoured recognition, because a judgment handed down abroad was not perceived as emanating from a 'foreign' legal system."

3 Ibid.

4 For example, in France, Article 121 Code Michaud (1629) denied all the effects of foreign judgments, cited in Michael (2009).

5 Zeuner and Koch (2012) p.4.

recognition is merely "an after-thought of limited practical importance".[6] In this era of globalization, repetitive proceedings have become much more common. If there are no explicit rules to provide otherwise, it is the freedom of a private litigant to choose a court of a state to sue regardless of what happens simultaneously or has happened previously in a court of another state. However, if this were permitted to go on without restrictions, there is the same risk to legal certainty and to the interests of private litigants as when a foreign judgment cannot be recognized at all as a basis for enforcement. Now that a foreign judgment can be recognized and be enforced like a domestic judgment, it is arguably possible for a foreign judgment to exert a certain similar *res judicata* effect as a domestic judgment. It has been suggested that mere recognition of a foreign judgment can give rise to other legal effects as well, for example, to be an excuse for avoiding a repetitive litigation. Kollewijn claimed in 1960, that although a Dutch court may be reluctant to enforce a foreign judgment, it may nevertheless give recognition to a foreign judgment and protect the successful litigant from being sued again by his unsuccessful opponent.[7] In the US, scholars have suggested that recognition of foreign judgments could lead to the same preclusive effect on a local court as domestic judgments,[8] even though additional considerations and limits are required.[9]

With regard to the second disadvantage, excessive attention to the practice of recognition and enforcement of foreign judgments risks creating ignorance of the significance of recognition of other types of judgments than monetary judgments. These is no doubt that monetary judgments, i.e. judgments adjudicating a sum of money payable from one party to another, deserve to be the "protagonist" in transnational litigation. Nevertheless, in practice, in legal areas such as maritime law, there are many kinds of judgments whose effect can only be fully achieved by cross-border recognition. Judgments that concern the constitution of a legal situation or status offer a good example, such as judgments on the constitution of a limitation fund[10] or judgments on the judicial sale of a ship.[11] Judgments of these kinds, do not involve the same specific obligations as monetary judgments.[12] The process of enforcement is unnecessary as they are considered as "self-executing" in some jurisdictions.[13] When the subject-matter of recognition is extended to more types of

6 Briggs (2013) (2) p.141.
7 Kollewijn (1960) p.34-38, cited in Von Mehren and Trautman (1968) p.1602.
8 It means that a thing adjudged is accepted for the truth. A decision which is once rendered by a competent court on a matter at issue between the parties after a full enquiry should not be permitted to be litigated over again. See in Zeuner and Koch (2012) para.6.
9 Smit (1962) ff.61.
10 See Chapter 6 Section 6.3.
11 See Chapter 6 Section 6.4.
12 Based on the common law theory, they may be called as judgments *in rem*. Unlike judgments *in personam*, judgments *in rem* are considered as binding anyone the world, see in Dicey, Morris and Collins (2016) ff.715.
13 Blomeyer (1982) para. 73.

judgments, the significance of recognition of foreign judgments can be further revealed. This contributes to a more thorough understanding of the concept of recognition of foreign judgments.

1.2 Research Questions

The main research question of this study is to identify, by exploring the law and practice of recognition of foreign judgments in the EU, England and Wales and the US, how the mechanism of the recognition of foreign judgments can be optimized in transnational litigation?

The sub-questions are:

a. What legal effects can be achieved and how can these be achieved through recognition of foreign judgments?
    1. What are the general requirements and refusal grounds for the recognition of foreign judgments in the selected jurisdictions? What are the similarities and differences in court practice between the selected jurisdictions in determining whether to recognize a foreign judgment and why?
    2. Besides providing a legal basis for cross-border enforcement, what are the possible legal effects that can be achieved through the recognition of foreign judgments based on the recognition laws in the selected jurisdictions?
    3. How do courts in the selected jurisdictions choose the applicable law to determine the preclusive effects of foreign judgments? What are the requirements and considerations for a court in recognizing the claim preclusion effect and issue preclusion effect of a foreign judgment in the selected jurisdictions? Which similarities and differences exist in court practice between the selected jurisdictions in recognizing the preclusive effects of foreign judgments?
b. Which lessons can be drawn from the practice of recognition of foreign judgments in the context of maritime law?
    1. How does recognition of typical maritime judgments work in the selected jurisdiction and what legal consequences does this have?
    2. What are the general procedures for the recognition of foreign judgments in the selected jurisdictions? Under what circumstances can the specialized admiralty procedures be used to seek recognition of foreign maritime judgments and what is the practical significance of these?

1.3 Research Design

1.3.1 The selected jurisdictions and legislations

The author selects the European Union (EU), England and Wales and the United States (US) as three different jurisdictions to answer the above questions.

In the EU, the Brussels Ibis Regulation, namely the Regulation No.1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereinafter: Brussels Ibis), is the fundamental legal basis for the recognition of foreign judgments among the member states. It not only represents the most advanced multilateral framework for the recognition of foreign judgments, but also represents the latest development in recognition of foreign judgments between most of the civil law countries in Europe. Brussels Ibis has its systematic arrangements on jurisdiction, concurring proceedings and related actions, recognition of foreign judgments and enforcement of foreign judgments. It illustrates how the recognition of foreign judgments involves minimum requirements. Even though the preclusive effects of foreign judgments are not explicitly mentioned in its text, it is still worthy to explore whether the recognition of the preclusive effect has already been included therein, and what is the attitude of Brussels Ibis toward precluding repetitive litigations and conflicting judgments. Moreover, it should be noted that Brussels Ibis provides a sound basis for the recognition of many typical maritime judgments, which are still not possible under national recognition law.

The corresponding provisions of its predecessors, i.e. Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 1968 (hereinafter: Brussels Convention 1968) and Council Regulation No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: Brussels I) will also be assessed, if necessary.[14] Apart from the specific rules, the rulings of the European Court of Justice (hereinafter: ECJ) are of equal importance,[15] which illustrate how the rules of the Regulation should be interpreted and applied.

England and Wales, as part of the United Kingdom (UK), together with the US, constitute two important representatives of the common law tradition, and can illustrate

14 In this research, the term "Brussels Regime" will be used to refer to the Brussels Convention 1968, the Brussels I, the Brussels Ibis and also Lugano Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2007 (hereinafter: Lugano Convention 2007).

15 In 1971, before the Brussels Convention 1968 came into force, the member states of the EEC granted power to the ECJ (before 1st December 2009 called the Court of Justice of the European Communities) to give preliminary rulings concerning the interpretation of the Brussels Convention 1968 by signing the Protocol concerning the interpretation the Convention. After the establishment of European Union and with the Brussels Convention converted to part of European Union law, protocol is no longer needed. According to Article 19 (3) Treaty of European Union, the ECJ has jurisdiction to interpret the European Union law.

how the common law countries treat the issue of recognition of foreign judgments. Furthermore, these two jurisdictions have the reputation of granting courts discretionary powers to recognize the exterritorial effect of foreign judgments,[16] and to give preclusive effect to foreign judgments,[17] especially when compared with other countries with a civil law tradition. The discussion based on these two jurisdictions can show the maximum effect that can be pursued through the recognition of foreign judgments from a national law perspective.

As for the laws of England and Wales, hereinafter referred to as English law, the Administration of Justice Act 1920 (hereinafter: 1920 Act) and the Foreign Judgments (Reciprocal Enforcement) Act 1933 (hereinafter: 1933 Act) illustrate the approach taken by the English courts in recognizing judgments from countries which have certain political connections and reciprocal arrangements with the UK.[18] Apart from these statutes, in Part IV Miscellaneous Provisions of the Civil Jurisdiction and Judgments Act 1982 (hereinafter: 1982 Act), there are several provisions that can be used for foreign country judgments outside of the two Recognition statutes and the Brussels Regime.[19] These provisions will be discussed below, particularly in Chapter 3, Chapter 4 and Chapter 5.[20] Moreover, the common law rules will also be examined in that some of them are followed by the statutes and supplement the interpretation of the rules under the statutes,[21] although some of these are distinguished from the statutes.

After Brexit, the national laws of the England and Wales will raise its profile once more in relation to recognition of judgments originating from courts in EU member states unless

16 Juenger (1988) p.9.

17 Casad (1984) ff.62.

18 The 1920 Act only applies to judgments arising from countries which have historical or constitutional relationships with the United Kingdom, such as New Zealand, Nigeria and so on. The 1933 Act applies to countries which provide reciprocal treatment to English judgments, such as Australia, Canada (except Quebec), India, see in Freeman and Bakshi (2017).

19 According to the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, SI 2019 No 479, the Brussels Regime is no longer effective after the Exit Day (31 Jan 2020) in the UK. However, for those proceeding that has been initiated before the Exit Day, the Brussels Regime will continue apply by the English courts according to Part 6 of SI 2019 No 479.

20 See Chapter 3 Section 3.3.1, Chapter 4 Section 4.3.2.2 and Chapter 5 Section 5.3.

21 Courts sometimes refer to the rules under the common law to determine the cases under the statutes since the rules are more specific under the common law, see in *Owen Bank Ltd v Bracco* [1992] 2 AC 443 (HL); *Syal v Heywaed* [1948] 2 KB 443 (CA). See also in Yntema (1935) p.1159.

the UK were to become party to the Lugano Convention 2007[22] or were to agree to another Brussels-like arrangement with the EU.[23]

In the US, recognition of foreign judgments can be sought either in a state court or a federal court, therefore relevant rules on recognition exist both on the state and federal level. When a foreign judgment is raised before a state court, state recognition law will be applied. And different states may have different rules. When the foreign judgment is raised before a federal court based on the diversity jurisdiction,[24] it is now widely recognized that state recognition law will still be applied to decide the issue of recognition.[25] However, if the recognition of foreign judgments concerns the preclusive effect of foreign judgments, federal law may still play a role.[26] For easy reference, in the following discussion, the author will refer to the laws on recognition as applied by the US courts generically as "US law", and distinguish between state law and federal law where necessary.

Currently, the two Uniform Acts, which are of the nature of model laws, i.e. Foreign-Money Judgments Recognition Act (hereinafter: 1962 Act) and Foreign-Country Money Judgments Recognition Act (hereinafter: 2005 Act), are the most important sources that can present the American perspective on recognition of foreign judgments. The 1962 Act was enacted by 24 states, the District of Columbia, and the US Virgin Islands.[27] After the introduction of the 2005 Act, 16 states and the District of Columbia renewed their

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22 The Ministry of Justice has expressed the view that Lugano 2007 might be an option to deal with the post-Brexit judicial cooperation between the UK and other EU member states. However, the UK government has concerns as to the ECJ's overseeing, see in 'Corrected oral evidence: Brexit: civil justice co-operation and the CJEU' by Rt Hon Sir Oliver Heald QC MP, Minister of State for Courts and Justice, Ministry of Justice before the House of Lords' Sub-Committee on European Affairs (31 January 2017) http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcom-mittee/brexit-civil-justice-cooperation/oral/46539.html accessed on 18 July 2021. See also in Briggs (2019) p.126.

23 In the UK Government Report, 'Providing a cross-border civil judicial cooperation framework' (22 August 2017), it is stated that, "the UK will therefore seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework." https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf accessed on 18 July 2021.

24 The definition of the federal diversity jurisdiction means that, according to 28 U S C §1332, "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between – … (b) (2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State; … "

25 In: *Erie Railroad Co. v Tompkins* 304 US 64 (1938), it was held that, a federal court sitting in diversity jurisdiction is required to follow the law of the state where the federal court sits to "except in matters governed by the Federal Constitution or by acts of Congress" to decide the issues of substantive law. Also see in S I Strong, 'Recognition and Enforcement of Foreign Judgments in U.S. Court: Problems and Possibilities' (2014) 33 *Review of Litigation* 45, ff. 65, also see in Brand (2017) p. 286.

26 *Alfadda v Fenn* 966 F Supp 1317 (S D N Y 1997). See also in Brand (2017) p. 286; Brummett (1988) p.109.

27 Information can be found inhttps://www.uniformlaws.org/committees/community-home?CommunityKey=9c11b007-83b2-4bf2-a08e-74f642c840bc accessed 18 July 2021.

state law following the new 2005 Act. Currently, there are 25 states and the District of Columbia that have enacted the 2005 Act.[28] Apart from these two Acts, the discussion will be based on the common law rules. The rules on recognition of the preclusive effect of foreign judgments are mainly under the common law.

1.3.2 Special focus on foreign maritime judgments

The research will take a particular focus on maritime judgments to further explore the concept of recognition of foreign judgments. The reasons are as follows:

First, as mentioned above, the reason why the importance of recognition of foreign judgments in transnational litigation has not been fully revealed is partly due to the excessive focus on recognition and enforcement of foreign monetary judgments. Therefore, it is necessary to rely on a concrete legal context to explore the effect of recognition of foreign judgments. Maritime law offers several kinds of non-monetary judgments with great practical significance, which depend for their efficacy on (often tacit) recognition by courts in other maritime countries. Examples include court orders on ship arrests,[29] the judgments on the constitution of a limitation fund[30] and judicial sales of ships.[31] By exploring these practices, the practical significance of the recognition of foreign judgments can be clarified in a concrete way, in particular, how recognition of foreign judgments serve to achieve the effect of certain maritime judgments and how recognition of foreign judgments can be invoked by a private litigant to preserve the rights and interests that have been convoyed in the particular legal mechanisms of maritime law.

Secondly, the focus on maritime judgments also provides a new perspective to explore whether there could be any peculiarities in the recognition of judgments in a specific field. The selected two common law jurisdictions, both have specialized admiralty jurisdictions which sustain particular procedures such as actions *in rem*[32] and Rule B attachments.[33] Case law shows that parties tend to prefer these admiralty procedures to institute their recognition actions.[34] The exploration of these varieties in practice will definitely further enrich our understanding of the concept of the recognition of foreign judgments.

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28 Information can be found in https://www.uniformlaws.org/committees/community-home?CommunityKey=ae280c30-094a-4d8f-b722-8dcd614a8f3e accessed 18 July 2021. Besides, another two states have introduced this Act but have not yet enacted them.

29 Chapter 6 Section 6.2.

30 Chapter 6 Section 6.3.

31 Chapter 6 Section 6.4.

32 Chapter 7 Section 7.3.2.

33 Chapter 7 Section 7.4.2.

34 For example, *The City of Mecca* (1879) 5 PD 28; *The Despina G.K.* [1982] 2 Lloyd's Rep 555 (QB); *Vitol* 708 F 3d 527 (2013); *Flame S.A. v Freight Bulk Pte Ltd* 762 F 3d 352 (4th Cir 2014); *D'Amico Dry Ltd. v Primera Maritime (Hellas) Ltd* 756 F 3d 151(2nd Cir 2014).

1.3.3 Outline

Besides the introduction and conclusion, the research is composed of three parts. Part I and Part II are general discussions on the recognition of foreign judgments. And Part III concerns a particular focus on maritime judgments.

In Part I, namely Chapter 2, it will be examined what are the minimum requirements and possible refusal grounds for the recognition of foreign judgments in the selected jurisdictions and the variations in the interpretation and understanding of the requirements and refusal grounds by the courts in the selected jurisdictions.

Part II consists of three chapters. Chapter 3 provides a general theoretical discussion on the prevailing approaches that the court addressed might take to grant a preclusive effect to foreign judgments in the selected jurisdictions. This chapter is the basis for the following two chapters. Chapter 4 concerns the recognition of the claim preclusion effect of foreign judgments. Based on case law, it is explored how and to what extent the court addressed in the selected jurisdictions gives claim preclusion effect to foreign judgments. Chapter 5 concerns the recognition of the issue preclusion effect of foreign judgments. It is examined how and to what extent the court of addressed in the selected jurisdictions give issue preclusion effect to foreign judgments.

In Part III the discussion moves to the specific area of maritime law and consists of two chapters. In Chapter 6, it is examined how the recognition of foreign judgments can be used in the three different typical maritime cases. It is examined and clarified that how the recognition law interacts with maritime law and how recognition of foreign judgments enhances the effect of maritime judgments in international maritime litigation. In Chapter 7, it is discussed in particular, from a procedural perspective, how recognition of foreign judgments is dealt with in the selected jurisdictions and what are the significance and peculiarities in cases concerning maritime judgments.

1.4 Methodology

1.4.1 Functional comparative approach

A functional comparative approach is adopted in this research. The international community experiences the rapid development of international trade and commerce. With an increasing number of cross-border disputes, courts may encounter the question of how to deal with foreign judgments. Therefore, it is required in all legal systems to have certain rules or institutions in respect to the effect of foreign judgments. Based on this, the functional equivalents of this comparative research will evolve around two main points:

what are the legal effects that result from recognition of foreign judgments and how do the courts in the selected jurisdictions deal with these possible effects.

The selected jurisdictions are: the EU, England and Wales, and the US. Traditional comparative study prefers to compare two or more national legal systems or national laws. However, in this research, the rules selected for comparison have different legal status and originate from different levels, i.e. international law (European law), national laws (English law and the US law). Despite these differences in origin and legal status, the relevant recognition rules are still comparable. A comparative method is possible to analyse aspects of EU law,[35] in comparison with national systems. Besides, as the functional comparative approach focuses on rules and institutions which serve a comparable function, the legal status of the rules or the level from which they originate are of lesser importance.

1.4.2 Legal analysis

In this research, legal analysis will be an important tool. As the research is conducted based on the cases and rules in relation to Brussels Ibis and national laws on recognition of foreign judgments, as well as the cases in maritime law, they will be analyzed according to the holdings of the courts, the legal commentaries, the works of the scholars, and other related literature.

1.5 Limitations

First, the selection of the jurisdictions of England and Wales and the US may be challenged on the ground that they have similar common law backgrounds and legal traditions which may reduce the value of comparison in this research. The choice of these two jurisdictions is partly due to limits on the languages accessible to the author. But more importantly, the two jurisdictions possess a comparatively rich court practice regarding the recognition of foreign judgments. As will be explored in the following chapters, the similarities between the two jurisdictions do not necessarily mean that they cannot have diverging views and approaches to recognition of foreign judgments. The diverging views demonstrate the variabilities in practice and enrich our understanding of the effectiveness of recognition of foreign judgments in private international law. Another reason to choose for these two

35 It should also be noted that EU regulations, are normally considered as having an extra level of national law, since they are autonomous legal order, supreme and directly effective in its member states, see in Robert Cryer and Tamara Hervey (eds), *Research Methodologies in EU and International Law* (Hart Publishing 2011) 28.

jurisdictions is that they both have a long tradition of maritime practice. Therefore, they provide the benefit of their experience in the recognition of foreign maritime judgments.

Second, with regard to the issue of recognition of the preclusive effect of foreign judgments in Chapter 3 and Chapter 4, the examination under Brussels Ibis mostly focuses on the question of whether based on the uniform rules, any recognition of preclusive effect of foreign judgments can be traced. The limitation emerges as only limited examination is conducted based on the national laws of the EU member states. The reason for this is also partly lies in the author's language limits and the lack of accessible non-English materials. However, the examination based on the uniform rules does result in some interesting findings, for example, it will be argued in the following chapters that there is an autonomous preclusive effect implied in the uniform rules. These findings could add value to our understanding of the effectiveness of recognition of foreign judgments from the perspective of uniform rules.

Third, the special focus on maritime cases may be questioned as well. It may give rise to challenges as to whether it is necessary to have a special focus on a particular field of law to conduct this research and why maritime law, rather than other fields of law, is chosen. This can be justified by the fact that previously less attention was paid to the question of whether recognition of foreign judgments in the context of a specialized field of substantive law has any peculiarities. Furthermore, as maritime disputes mostly have foreign elements, a number of cases concerning the recognition of foreign judgments are maritime related, which makes it feasible to conduct research from this specialized angle. The cases appeared in the context of where Brussels Ibis further demonstrates how effectively the recognition of typical maritime judgments could serve protection to the rights and interests of the private litigants, which is another reason to have a specialized focus on this field of law. Therefore, by focusing on maritime judgments, the research tries to fill in the blank left by the previous studies and explore the inner relationship between recognition of foreign judgments and the substantive rules in this area. Nevertheless, it can be imagined that in other fields of law, such as intellectual property law, recognition of foreign judgments may also be unique. And this can be a potential direction of the future study.

Fourthly, the author leaves outside the scope of this research the Hague Convention of 30 June 2005 on the Choice of Court Agreements and the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, although these are the examples of the latest international legislation on foreign judgments. There are several practical and substantive reasons for this. To begin with the 2019 Convention was adopted when this research was already well advanced and would have required a substantial restructuring of the setup of this study. There is also very little international court practice with regard to the 2005 Convention which came into legal force only 1 October 2015 and none in relation to the 2019 Convention. Further, the

primary focus of this research is on the legal effects arising from the recognition of foreign judgments *per se*, namely the claim preclusion effect and the issue preclusion effect. However, the focus of the 2005 and 2019 conventions is still mainly on the recognition of foreign judgments for the purpose of enforcement. Further still, another focus of this research is directed to the examination of the recognition of foreign maritime judgments, yet maritime issues are largely excluded by the 2005 and 2019 conventions. Finally, the 2005 and 2019 conventions generally apply to foreign monetary judgments, whereas, in this research the recognition of certain typical non-monetary maritime judgments is of importance to elucidate the significance of the concept of recognition of foreign judgments.

Part I
Requirements and Refusal Grounds for the Recognition of Foreign Judgments

2 Requirements and Refusal Grounds

2.1 Introduction

In the past century, based on the awareness that foreign judgments should be given cross-border effect, countless efforts have been made on the international, regional, and national level. Among these, the most successful case is the one in Europe. Considering the demands of the internal market and the benefits for their citizens, the member states of the European Economic Community (EEC) in 1968 concluded a multilateral convention to facilitate the recognition and enforcement of judgments between the member states, the Brussels Convention 1968,[36] which also alleviated the crisscrossed situation caused by a multitude of bilateral conventions in Europe.[37] After the EEC had evolved into the European Union (EU) in 1993, a council regulation i.e. Brussels I,[38] was adopted in 2001. It basically follows the rules of the Brussels Convention 1968 and establishes the principle of mutual recognition of foreign judgments with the aim of facilitate access to justice.[39] In January 2015, Brussels I was formally updated by Brussels Ibis.[40] Currently, the Brussels Ibis, together with the Brussels Convention 1968,[41] the Lugano Convention 2007,[42]

36 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 1968 (hereinafter: Brussels Convention 1968). After the coming into force of Brussels I, the Brussels Convention 1968 only applies between the 15 pre-2004 member states of the Eu and certain territories of EU member states that are outside the Union, i.e., Aruba, the French overseas territories and Mayotte.

37 Bellet (1965) p.845, cited in Hey (1968) p.149 and footnote 67.

38 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: Brussels I).

39 Article 67(4) Treaty on the Functioning of the European Union.

40 Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereinafter: Brussels Ibis).

41 After the coming into force of Brussels I, the Brussels Convention 1968 only applies between the 15 pre-2004 member states of the EU and certain territories of EU member states that are outside the Union, i.e., Aruba, the French overseas territories and Mayotte.

42 Lugano Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2007 (hereinafter: Lugano Convention 2007). Its predecessor is the Lugano Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters 1988 (hereinafter: Lugano Convention 1988), which was created as a parallel convention of the Brussels Convention 1968 to extend its recognition regime to the then six members of the European Free Trade Association (EFTA), including Austria, Finland, Iceland, Norway, Sweden and Switzerland. After the coming into force of Brussels I, the Lugano Convention 2007 made changes in accordance with the provisions of Brussels I and fully replaced the Lugano Convention 1988. The Lugano Convention 2007 has been signed by the EU, the Denmark and the current three out of four members of the EFTA, i.e. Iceland, Switzerland, Norway. After Brexit it is conceivable that the United Kingdom may become party to the Lugano Convention 2007.

constitutes the regulatory framework of recognition and enforcement of foreign judgments in Europe, known as the Brussels Regime.

Apart from the uniform rules on the EU level, there is also distinctive expertise and practice in dealing with the recognition of foreign judgments at the national level, especially in the two well-known common law countries, i.e. the UK and the USA. Both these countries have notable practice on judgment recognition within their composite constitutional settings, which has paved the way for their approach to the recognition of foreign country judgments.[43] Apart from their common law rules, these states have also made significant progress in promulgating statutory rules on foreign judgments. As for the UK, it has a history as the British Empire, eventually the British Commonwealth of Nations, which until after the World War II was composed of many different countries. This led to an extensive traffic of judgments. Based on these political connections, reciprocal recognition and enforcement of foreign judgments was confirmed by the 1920 Act and 1933 Act.[44] They are important content of English recognition law. The US, a federal district consisting of fifty states, four major self-governing territories, and various possessions, gives rise to a high level of interstate traffic of judgments. The Full Faith and Credit Clause of the United States Constitution serves as the basis for the recognition of inter-state judgments.[45] In terms of the recognition of foreign judgments, the Uniform Law Commission (ULC) promulgated two Uniform Acts, i.e. 1962 Act and 2005 Act,[46] to enhance the recognition of foreign judgments and unify the rules on this matter.[47]

The common core of these rules is that they were originally designed to deal with the recognition of foreign judgments for enforcement purposes i.e. the first and primary aspect of recognition of foreign judgments. Some of the rules do not even distinguish clearly between recognition and enforcement. For example, under the English statutes, the requirements and refusal grounds for the recognition of foreign judgments equal those for the enforcement of foreign judgments. By contrast, other rules do make the distinction. For example, according to the titles of the two American Uniform Acts, the rules are meant for the recognition of foreign judgments, not for their enforcement. Irrespective of how the rules are called and designed, the content of these rules mainly refers to the requirements

43 Yntema (1935) p.1132.

44 The Administration of Justice Act 1920 (hereinafter:1920 Act) and the Foreign Judgments (Reciprocal Enforcement) Act 1933 (hereinafter: 1933 Act).

45 U S Constitution Art. IV §1. It provides that, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof".

46 The Uniform Foreign Money-Judgment Recognition Act 1962 (hereinafter: 1962 Act) and the Uniform Foreign-Country Money Judgment Recognition Act 2005 (hereinafter: 2005 Act).

47 As for the 1962 Act, it was eventually adopted in substantial part by 32 states, the District of Columbia and the US Virgin Islands. The 2005 Act, which is an updated version, has been adopted by 25 states and the District of Columbia. Therefore, currently, some states follow the 1962 Act, some follow the 2005 Act, and some still follow the common law rules to deal with the recognition of foreign judgments.

and possible refusal grounds for the recognition of foreign judgments, which could demonstrate a general view on recognition of foreign judgments of the selected jurisdictions.

2.2 Justifications

Prior to the adoption of statutory rules, recognition of foreign judgments depended upon the discretion of the court and thus required a justification. Courts may apply the justifications, such as the principles of comity, reciprocity, or the theory of obligation, by discretion to validate a foreign judgment even without any further grounds.[48] They may also refuse to recognize a foreign judgment even though it appears to be valid.[49] After the adoption of statutory rules,[50] these justifications are either incorporated in the requirements or serve as an overarching principle guiding the practice of the courts.

2.2.1 Brussels Ibis

Before the adoption of the Brussels Convention 1968, the recognition of foreign judgments in the European countries was restricted by "nationalism".[51] States traditionally have a deep distrust of the administration of justice in foreign countries.[52] Therefore, they tended to disregard foreign proceedings and foreign judgments. From the beginning of the 20th century, there appeared a number of bilateral treaties between the European states dealing with the issue of movement of judgments.[53] However, the resulting "spider web" of bilateral treaties was not only complicated but also incomplete. The entry into force of the Brussels Convention 1968 ended the chaos caused by the bilateral treaties and led the recognition of foreign judgments to be more and more efficient between the (at that time) six member states of the European Community. This spirit has been inherited by Brussels I as well as Brussels Ibis.

Currently, the simple and efficient circulation of judgments under Brussels Ibis is sustained by the principle of mutual trust, which was formally raised in the Presidency Conclusions in a special meeting held by the European Council in Tampere in October

48 For example, in the early English law, English courts recognized foreign judgments only for the purpose that English judgments could be recognized abroad, see in *Roach v Garvan* (1748) 1 Ves Sen 157, 159.

49 *Hilton v Guyot* 159 U S 113 (1895). The French judgment was eventually refused because of the lack of reciprocity between the USA and France.

50 For example, 1933 Act codified the requirement of reciprocity.

51 Reimann (1995) p.58.

52 Graupner (1963) p.368.

53 Ibid.

1999.[54] After that, mutual trust became the cornerstone of judicial cooperation in both civil and criminal matters with the European Union.[55]

In Recital 26 Brussels Ibis, the concept of mutual trust is mentioned as follows,

> "Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognized automatically without the need for any procedure except in cases of dispute…by virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation."[56]

Even though there is no settled definition for mutual trust,[57] the arrangement of Brussels Ibis fully reflects what mutual trust requires. First and foremost, mutual trust requires member states to be trustful and reliable, and includes giving automatic recognition, and abandoning the *exequatur* requirement,[58] and broadening the scope of judgments that can be recognized and enforced.[59] Moreover, mutual trust is established on the basis that member states fully fulfill their obligations and are willing to be restrained at some points.[60] Member states must further abandon exorbitant jurisdictions and respect the jurisdiction of other states' courts that were first seized of the case. They also need to limit their review of foreign judgments to exceptional circumstances only.[61] In short, the function of mutual trust is to give effect to the current Brussels Ibis's objectives of enhancing the cooperation between the member states,[62] and of maintaining and developing an area of freedom, security and justice.[63] Moreover, mutual trust helps adjudicators to decide complex

54 Tampere European Council Presidency Conclusions http://www.europarl.europa.eu/summits/tam_en.htm accessed 18 July 2021.
55 Ibid.
56 The concept of mutual trust is phrased basically in the same way as Recital 17 Brussels I.
57 Kramer (2011) p.217. It is suggested that mutual trust refers to the confidence between states that results in the prohibition to review the judiciary acts of foreign courts in other EU member states.
58 See Article 38 Brussels I. The *exequatur* means a declaration process in which the court addressed declares the enforceability of foreign judgments.
59 Recital 33 Brussels Ibis.
60 Article 29 and 30 Brussels Ibis.
61 Article 45 Brussels Ibis.
62 Andersson (2006) p.747-752.
63 Recital 3 Brussels Ibis.

situations, especially where the provisions are not so specific, such as whether to sustain an anti-suit injunction.[64]

However, mutual trust among the member states is not absolute. From the arrangement of refusal grounds, especially the public policy exception, it follows that member states are still entitled to withhold their trust in individual cases where it is established that fundamental fairness has been infringed.

2.2.2 English law

Under English law, the common justification for the recognition of foreign judgments is based on the obligation theory, especially under common law.[65] For example, in *Schibsby v Wesenholz*,[66] the obligation theory was adopted and comity was rejected as the basis for recognition and enforcement of foreign judgments.

The obligation theory argues that foreign judgments constitute an agreement binding upon the parties.[67] As for the claimant, if he instituted foreign proceedings, he expressly invoked the jurisdiction of the foreign court, which implies that he offered to be bound by the outcome. As for the defendant, if he submitted himself to the foreign court or responded to the writ of summons for the foreign court proceedings, this implies that he agreed to accept the judgment rendered by the foreign court. Therefore, it is suggested that the obligation does not originate from "the judgment *qua* judgment", but from the "conduct of the party who is proposed to be bound in relation to the proceedings".[68]

Unlike under the common law, reciprocity does constitute the basis for recognition and enforcement of foreign judgments under two English statutory Acts. Foreign countries which enjoy the reciprocal treatment are those which have political connections with the UK, such as countries belonging to the Commonwealth of Nations and previously the British Empire. Judgments from these countries can be enforced through the statutory registration procedure.[69]

64 *Turner v Grovit* (Case C-159/02) [2004] ECR I -3565.

65 Dicey, Morris and Collins (2016) para.14-007-008.

66 (1870) LR 6 QB 155. Apart from the obligation theory, some scholars and judges also employ the principle of comity to justify recognition of foreign judgment under English law. It is claimed that the basis for recognition of foreign judgments is the respect for the territorial sovereignty of foreign countries, and the "demands of private international law as international law stop", see Briggs (2012) p.149 and Briggs (2013) p.92.

67 Briggs (2013) p.90.

68 Briggs (2013) p.93-94.

69 Civil Procedure Rule (CPR) 74.3.

2.2.3 The US law

In the US, the recognition of foreign judgments takes place at two levels. The first level concerns the recognition of sister-state judgments and is mainly governed by the Full Faith and Credit Clause of the United States Constitution.[70] In implementing this constitutional Clause, it is provided by the full faith and credit statute that a court of a state should give full faith and credit to judicial proceedings in the United States.[71] It follows that a sister-state judgment is generally given essentially the same preclusive effects as it has in the state of origin.[72]

The second level concerns the recognition of foreign country judgments. In this connection, the principle of comity and reciprocity comes into play. The US is the most notable proponent of the principle of comity. In *Hilton v Guyot*,[73] the U.S. Supreme Court has defined comity as follows,

> "Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[74]

This definition has incurred many criticisms. It has been said that the definition of comity "signifies little except perhaps some form of undefined and indefinable international goodwill or courtesy",[75] and is a "general mode of expression that at most expresses an attitude or disposition and on analysis is simply circular".[76] It was also suggested that recognition based on comity means that "recognition will be given when it will be given",[77] and that it fails to clarify what precise measure of recognition can be accorded to foreign judgments.[78] Moreover, it was suggested that although comity mitigates the conflicts

70 U S Constitution Art. IV §1.
71 28 USC §1738. It has provided that "such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."
72 Von Mehren (1981) p.1052, see also in Erichson (1998) p.983.
73 159 US 113 (1895).
74 Ibid. 163-64.
75 Smit (1966) p.174.
76 Von Mehren and Trautman (1968) p.1603; see also in Casad (1984) p.58.
77 Smit (1962) p.54.
78 Smit (1966) p.174.

between sovereigns, it blurs the lines between law and policy.[79] Despite these criticisms, comity is still a popular justification in the US, especially at common law.[80]

Reciprocity is another important but often disputed justification for the recognition of foreign judgments. In *Hilton v Guyot*,[81] it was the lack of reciprocity between French courts and American courts that eventually led to the refusal of recognition to a French judgment. In line with this holding, it has been suggested that to adopt the reciprocity requirement will benefit US nationals, as it encourages foreign states to grant greater recognition to American judgments by changing their laws,[82] and by guaranteeing the rights of US nationals.[83]

However, there are strong objections to reciprocity. Some argue that reciprocity may lead a court addressed to ignore the real question whether a foreign judgment would bring about injustice to the local legal system.[84] If reciprocity applies, the effect of a foreign judgment is decided based on foreign principles, and it is not fair for the parties to bear the consequence for actions taken by their government.[85] Some scholars suggest that the requirement of reciprocity is an empirical question and still needs to be answered.[86]

Notably, neither of the two Uniform Acts includes reciprocity as the basis for recognition of foreign country judgments. By incorporating the Uniform Acts into their state laws, most states have excluded reciprocity as a requirement for recognition. Currently, only a few states do still require reciprocity for the recognition of foreign judgments.[87] This indicates that the role of reciprocity in the US law is weakening.

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79 Paul (1991) p.79.

80 § 481 Comment c and Reporters' Notes 4, Restatement (Fourth) of Foreign Relations Law (2018). See also in Bishop and Burnette (1982) p.429-430. "The *Hilton* language still remains the predominant statement of the elements which must exist before a foreign-country judgment will be recognized in the United States"; Comity has also formed the basis for recognition of foreign judgments in other Anglo-American legal system countries, for example in Canada, the court viewed that "comity" is a "practical necessity", see in Black, Blom and Walker (2011) p.500.

81 159 US 113 (1895).

82 § 7 Comment b, American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006).

83 This view has been rejected by Willis Reese, the draftsmen of the 1962 Act, by suggesting that, "the due process concepts embodied in the Act were an adequate safeguard for the rights of citizens sued on judgments obtained abroad". Moreover, Professor Kurt Nadelmann … in introducing the Uniform Foreign Money Judgments Recognition Act to the Uniform Law Commissioners, contrasted it with a British statute dealing with recognition of foreign judgments: "The British Act does not include a due process requirement. Our draft does. I think it would seem obvious that no legislation should be enacted without a due process requirement. The British Act does not contain it because the British Act has a reciprocity clause. The British try to pick their own partners and they just won't … certify the existence of reciprocity if they do not like their partner. These are different approaches, different possibilities … " in Hartley (2015) p.398.

84 Lenhoff (1956) p.482.

85 Coyle (2014) p.1119.

86 Baumgartner (2013) p.975.

87 Coyle (2014) ff.1109. Currently, only two U.S. states, namely Georgia and Massachusetts, require proof of reciprocity as a precondition to enforcing a foreign judgment; New Hampshire requires reciprocity for

2.2.4 Summary and preliminary comparative remarks

From the above, it can be found that in different frameworks, the justifications have different functions. Under Brussels Ibis, the significance of the principle of mutual trust is more than to justify why an EU member state should recognize and enforce a foreign judgment originating from a court of another EU member state. It is the pillar upon which Brussels Ibis rests and which supports the arrangements of the Regulation and which provides guidance to courts in deciding cases where the rules are not specific.

In the UK, the obligation theory is dominant at common law. Due to this, English law establishes strict requirements to assess the jurisdiction of foreign courts (which will be discussed in detail below). In contrast, both English statutes are based on the principle of reciprocity. With reciprocity, judgment creditors can enjoy the simplified registration procedure to enforce foreign judgments.

The US law prefers the principle of comity to justify the recognition of foreign judgments, especially at common law. Regarding the principle of reciprocity, its necessity is doubted from time to time. The legislative practice in the US shows that the scope for the principle of reciprocity decreases ever more.

2.3 Limits on judgments

123 The scope of the foreign judgments that can be recognized under statutory frameworks basically depends on the legislative pursuit. This means that judgments excluded from the statutory frameworks can still be recognized based on other rules. For example, Brussels Ibis only deals with judgments on "civil and commercial matters,[88] and expressly excludes a list of subject matter areas from its scope,[89] since the EU has specialized Regulations to deal with these judgments, such as judgments on insolvency, maintenance fees in relation to family affairs and so on.[90] Similarly, under English law, the 1933 Act excludes judgements

recognition only in cases involving Canadian judgments. Florida, Maine, Ohio and Taxes permit judges to take into consideration a lack of reciprocity to decide foreign judgments recognition.

88 Article 1 Brussels Ibis. In P Jenard, 'Report on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ, 1979) C 59/9 (hereinafter: Jenard Report), it has been claimed that decisions on civil or commercial matters given "by criminal or by administrative tribunals" can be recognized under Brussels Ibis.

89 Article 1(2) Brussels.

90 For example, Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations; Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

on matrimonial matters, administration of the estates of deceased persons, bankruptcy, winding up of companies, lunacy, or guardianship of infants,[91] but these judgments can still be recognized under the 1920 Act or under the common law. Moreover, the two English Acts and the American Uniform Acts all limit their scope to "monetary judgments",[92] but the recognition of non-monetary judgment can still be sought under common law.

2.4 Finality

There are additional limits on the recognition of foreign judgments. Among these, the finality of foreign judgments is of vital importance. Brussels Ibis does not incorporate the concept of finality, but it has specific rules intended to regulate the situation where the ultimate effect of foreign judgments is still uncertain. English law and the US law both involve the concept of finality.

2.4.1 Brussels Ibis

Brussels Ibis does not require finality. As noted in the Jenard Report,[93] the drafters intentionally avoided incorporating the concept of finality into the framework. Nonetheless, Brussels Ibis does deal with the situations where the effect of foreign judgments is uncertain. In Article 38, it provides that, in case of a judgment being challenged in the country of origin, the court addressed may suspend the proceedings in whole or in part.[94] It is suggested that the meaning of challenge in this provision includes the situation where ordinary appeal in the country of origin is taking place or is still possible,[95] with a specific period for appeal that can lead to the annulment or amendment of the foreign judgment.[96] Moreover, the notion of "challenge" also includes certain unforeseeable appeals that may be raised by persons extraneous to the original proceedings and that are not bound by the period for appeal.[97] There are also several limits on the scope of the challenge. First, the challenge should be effectively made in the country of origin. If there is only the possibility that an

91 Section 11 (2) 1933 Act.

92 Section 12 1920 Act and Section 1 1933 Act. From the names of the two Uniform Acts, the judgments concerned are monetary judgments. However, the 1920 Act also extends its scope to arbitration awards.

93 Jenard Report C 59/45.

94 Article 38 Brussels Ibis.

95 Article 37 Brussels I used the term "ordinary appeal". It is suggested that "the deletion of the term 'ordinary appeal' in the rule now enshrined in Art 38(a) reflects the doubts raised as to the usefulness of the distinction conveyed by that expression. As a matter of fact, once the judgment is challenged in the country of origin, a risk of inconsistency arises no matter the nature of the proceedings." see in Franzina (2015) para.13.142 and footnote 136.

96 Wautelet (2016) p.832.

97 Ibid.

appeal can be raised, the court may not order a stay. Second, a stay can only be given based on a challenge that leads to "reasonable doubts" concerning "the fate of the decision".[98]

2.4.2 English law

In English law, the concept of finality means that a judgment is no longer altered by the court which pronounced it.[99] Hence, a judgment that is subject to appeal or probably subject to appeal is still considered as a final judgment. Based on the meaning of the final judgment, under the common law, a foreign judgment subject to appeal or probably subject to appeal can be recognized. Nonetheless, the court can order a stay to suspend the recognition if the judgment debtor satisfies the court that the appeal is pending, or that he is entitled and intends to appeal.[100] This rule is followed by the 1933 Act. In a different way, in the 1920 Act, the meaning of finality is narrower. It provides that a judgment that is subject to appeal or might be subject to appeal is not final.[101] Following this, a judgment subject to appeal or potentially subject to appeal should not be recognized under the 1920 Act.

2.4.3 The US law

Similar to English law, under the US law, a final judgment means that the judgment is no longer subject to additional proceedings in the court of origin except for enforcement. A foreign judgment is considered final and conclusive even though the parties have not exhausted their rights of appeal or sought a discretionary review.[102] The 2005 Act provides that enforcement proceedings may be stayed if an appeal is pending or will take place in the court of origin until the appeal has been concluded or the time for appeal has expired or the appellant has had sufficient time to prosecute the appeal and has failed to do so.[103]

98 *Industrial Diamond Supplies v Riva* (Case 43/77) [1977] ECR 2175, 2188.

99 *Nouvin v Freeman* (1889) 15 App Cas 1 (HL):"no decision has been [or can be] cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it." See also in *Re Macartney* [1921] 1 Ch 522.

100 Dicey, Morris and Collins (2016) p.676-678 and 752.

101 Section 9 (2) (e) 1920 Act provides, "no judgment shall be ordered to be registered under this section if … (e) the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment … "

102 § 481 Comment d, Restatement (Fourth) of Foreign Relations Law (2018).

103 Section 8 2005 Act.

2.4.4 Summary and preliminary comparative remarks

Brussels Ibis avoids defining the finality of judgments. Instead, the drafters expressly and directly describe the specific situations where the effect of foreign judgments is uncertain.

In contrast, under English law and the US law, final judgments are clearly defined. Foreign judgments not subject to appeal in the court of origin are considered final. On the face of it, the definition is clear and seems quite generous to foreign judgments. However, in my view, the definition may cause more complications. As the definition of final judgments concerns another concept of "appeal", the court addressed has to investigate the procedural law of the country of origin to decide whether there is a potential appeal in the court of origin on a case-by-case basis. In some countries, apart from the ordinary appeals to which a party is automatically entitled, appeals of a more extraordinary nature without time limit are also allowed. In this case, it is doubtful whether there exist any final judgments based on the above definition. For example, under Chinese law, the Supreme court has the authority to remand a retrial in the original court without any time limit, as the result of an extraordinary appeal. Does it mean that a Chinese judgment will never be considered as final under English law and under the US law? If this is the case, countries with a similar civil procedure as China will be confronted with the same awkward situations. As the requirement of finality is designed to prevent those judgments with uncertain effect from being enforced, it is submitted that the approach taken by Brussels Ibis seems more straightforward. If finality is conceived as a requirement for recognition of foreign judgments, perhaps it is necessary for the court addressed to make a difference between ordinary appeals to which a party is automatically entitled and appeals of a more extraordinary nature in which special leave for appeal must be obtained before deciding whether a foreign judgment is final.

2.5 Jurisdiction of the foreign court

The need for an examination of the jurisdiction of foreign courts results from the diverging jurisdiction rules from one country to another. Since there are no uniform and binding jurisdiction rules internationally, courts have the freedom to decide whether the jurisdiction of the foreign court is enough to allow its judgment to be recognized.[104] If the court addressed concludes that the court of origin lacks jurisdiction, this is equivalent to the assertion that a different brand of justice should have been available to the parties.[105]

104 Juenger (1988) p.13.
105 Von Mehren (1980) p.37.

2.5.1 Brussels Ibis

Brussels Ibis adopts a direct jurisdiction system, in contrast with the indirect jurisdiction system,[106] which means that Brussels Ibis directly governs the ground upon which the court of origin may base its jurisdiction. The advantage of the direct jurisdiction system is that if a court of origin follows the jurisdiction rules, at the stage of recognition, there is less scope for disputes about jurisdiction later on. To reach consensus on the direct jurisdiction rules, the drafters have excluded some exorbitant grounds for jurisdiction on the basis of the national laws of the member states.[107] The jurisdiction rules follow the continental tradition to give priority to the jurisdiction of the court of the defendant's domicile.[108] The jurisdiction rules under Brussels Ibis also yield to the need for the protection of weaker parties, such as consumer and employee and insureds,[109] to certain exclusive jurisdiction grounds,[110] to the parties' agreement,[111] and to the defendant's voluntary submission to the court's jurisdiction.[112]

Despite the above, the most notable characteristic of the jurisdiction rules under Brussels Ibis is that they have a binding effect on the EU member states.[113] As member states must follow the rules, the necessity for a review of the jurisdiction of the court of origin at the stage of recognition of its judgment is reduced. Some scholars consider the limited review to be compensation for the restricted jurisdiction rules.[114] Nonetheless, the review is still open to weaker party defendants and in cases concerning exclusive jurisdiction. According to Article 45(1) (e) Brussels Ibis, the court addressed can review the jurisdiction only where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer, or the employee was the defendant or where exclusive jurisdiction grounds are involved. Article 45(1) (b) also reflects the idea of a limited jurisdiction review. Only where there is no possibility to challenge the jurisdiction of the court of origin, can parties seek refusal of recognition of default judgments before the court addressed.[115] This provision also implies that Brussels Ibis encourages parties to settle jurisdiction matters before the

106 These notions, also known as *compétence directe* and *compétence indirecte*, were originally developed in France and then widely used in civil law countries. Direct jurisdiction means the court's adjudicatory jurisdiction while indirect jurisdiction means the jurisdiction for recognition purposes.

107 For example, §23 German Code of Civil Procedure allows jurisdiction to be established on the basis of the assets of the defendant.

108 Section 2-7 Brussels Ibis.

109 Article 18 (1) Brussels Ibis; Article 21 (2) Brussels Ibis.

110 Article 24 Brussels Ibis.

111 Article 25 Brussels Ibis. This is different from Article 23 Brussels I, which requires at least one of the parties to the jurisdiction agreement to be domiciled in an EU Member State.

112 Article 26 Brussels Ibis.

113 Recital 6 Brussels Ibis.

114 Stadler (2005) p.1644.

115 Article 45 (1) (b) Brussels Ibis.

court of origin. If parties fail to challenge or could have challenged the jurisdiction before the court of origin, they will lose the opportunity to attack the jurisdiction at the recognition stage.

Due to the uniform and binding jurisdiction rules, the limited jurisdiction review under Brussels Ibis is attainable. This further promotes the circulation of foreign judgments among the member states.

2.5.2 English law

Outside of the regional uniform rules, under English law, the courts will conduct a jurisdiction review of the court of origin at the stage of recognition of a foreign judgment. The English indirect rules exist both under the common law and under the statutory acts,[116] and they are inter-related.

In *Emanuel v Symon*,[117] Buckley LJ recognized five alternative situations where the jurisdiction of the foreign court satisfied the requirement for the recognition of foreign judgments. These five situations form the indirect jurisdiction rules under the common law: (1) the defendant is a subject of a foreign country where the court of origin is located; (2) the defendant is a resident of the foreign country at the commencement of foreign proceedings; (3) the defendant against whom a counterclaim has been made had selected the court to make his initial claim; (4) the defendant has voluntarily appeared in court; (5) the defendant has made an agreement to submit himself to the foreign court.[118]

Another notable case concerning the indirect rules for reviewing the jurisdiction of foreign courts is *Adam v Cape Industries*.[119] This case partly changed and partly extended the common law rules in this regard. On the one hand, the Court of Appeal denied the view that the residence instead of the presence of the individual defendant within the jurisdiction of the state of the foreign court is a satisfactory basis for recognition of foreign judgments. It was addressed that the physical presence of a defendant in a state of where he owns the benefits of its laws, means therefore he should be amenable to the process of the courts of that state. In this light, the Court of Appeal held that the physical presence of an individual defendant within the jurisdiction of the state of origin was sufficient to satisfy the jurisdiction requirement for recognition of foreign judgments, regardless of whether the defendant has residence in that state or not, and whether the presence is temporary or permanent.

116 Section 4(1) (a) (ii) 1933 Act; Dicey, Morris and Collins (2016) p.689.
117 [1908] 1 KB 302.
118 Ibid.
119 [1990] Ch 433.

On the other hand, given the possible desirability of a further extension of the recognition and enforcement of foreign judgments concerning corporate defendants, the Court of Appeal established the jurisdiction requirement for corporate defendants. It was held that, if a legal entity has established and maintains a fixed place of business within the jurisdiction of the court state and carries on business from there for more than a minimal period through its servants or agents or carries on business through a representative at or through the fixed place for more than a minimal period,[120] the requirement of jurisdiction of the foreign court was satisfied.

In terms of the statutory rules on jurisdiction review, the 1920 Act and the 1933 Act basically follow the common law. However, compared with the common law rules, the jurisdiction review under the two statutes is restricted in two aspects. One regard is that the mere presence of the individual defendant within the jurisdiction of the state of the foreign court is excluded as a jurisdiction basis for recognition of foreign judgments. Instead, the jurisdiction on an individual defendant can be established either through his residence in the court state[121] or through his owning a place of business in that state.[122] In the latter case, the 1933 Act additionally requires that the cause of action underlying the foreign judgment is related to that place.[123]

The other difference lies in that the statutory rules, especially the 1933 Act, establish a more specific jurisdiction requirement for a corporate defendant. It provides that a foreign court has jurisdiction only if either the defendant has its principal place of business in the foreign country[124] or it has an office or place and the cause of action arose from a transaction effected through that office.[125] In contrast, the jurisdiction requirements for corporate defendants under common law disregard the form of the place of business and how the cause of action arose.

2.5.3 The US law

As mentioned above, most states have adopted one of the Uniform Acts and have promulgated state statutes on the recognition of foreign judgments. Therefore, the indirect jurisdiction rules under these Acts are normally applied to assess the jurisdiction of courts of origin.[126] The listed situations fall into two main groups, one based on the territorial connection between the defendant and the foreign court, the other based on the defendant's

120 [1990] Ch 433.
121 Section 9 (2) (b) 1920 Act and Section 4 (2) (a) (iv) and (v) 1933 Act.
122 Section 4 (2) (a) (iv) 1933 Act.
123 Section 4 (2) (a) (v) 1933 Act.
124 Section 4 (2) (a) (iv) 1933 Act.
125 Section 4 (2) (a) (v) 1933 Act.
126 Section 4 (a) (2) (3) 1962 Act and Section 4 (b) (2) (3) and Comment 6 2005 Act.

consent to being sued in the foreign court. Even though they seem quite similar to the English rules in this regard,[127] it should be noted that both Acts reserve the right of the court addressed to decide on a case-by-case basis, by providing that the listed bases for jurisdiction are not exhausive.[128] Furthermore, they also provide that courts have discretion to deny a foreign judgment based on the ground that the foreign court is a seriously inconvenient forum.[129]

If a state does not adopt either of the Uniform Acts or if the jurisdiction of the court of origin does not meet with the listed situations in the statutory rules of the states, courts will apply the common law rules to decide the jurisdiction of the foreign court.[130] It is very likely that American courts will use their own direct jurisdiction rules to review the jurisdiction of the foreign court of origin,[131] such as the relevant state's long-arm statute.[132] As long-arm statutes are normally used by American courts to assume jurisdiction, the scope of the jurisdictions recognized therein is relatively broad. Therefore, this approach seems beneficial to judgment creditors. However, it is suggested that to use these rules in order to review the jurisdiction of a foreign court is not well-founded because rules for assuming jurisdiction and rules for reviewing foreign jurisdiction are two quite different things.[133]

In some cases, American courts employ both the law of the court of origin and their own domestic law to assess the jurisdiction of the foreign court,[134] since this could guarantee that the court of origin has jurisdiction when it conducts the proceedings, and guarantee that the jurisdiction of the foreign court will not contradict the requirements of the US law. However, it was held by the Court of Appeals, Eleventh Circuit, that to allow a party to raise the defects of the jurisdiction of the court in accordance with the law of the court

127 See above *Emanuel v Symon* [1908] 1 K B 302 (CA).

128 Section 5 (b) 1962 Act and Section 5 (b) 2005 Act. See also in Silberman and Lowenfeld (2000) p.637; Homburger (1970) p.372: "the requested court could approve jurisdictional bases unknown to its domestic law if they conform to due process standards."

129 Section 4 (6) 1962 Act and Section 4(6) 2005 Act.

130 Reporters' Notes 5 § 483 Restatement (Fourth) of Foreign Relations Law (2018).

131 *Genjujo Lok Beteiligungs GmbH v Zorn* 943 A 2d 573, 580 (2008) In this case, the court used Maine's own state long-arm statute to assess the personal jurisdiction of the German monetary judgment and held that the German court had jurisdiction over the defendant who conducted certain business in Germany.

132 State long-arm statutes are used to determine whether a state court can exercise personal jurisdiction over a non-resident defendant from a foreign state, especially in cases of contractual disputes, torts, etc. A detailed survey can be found in Price Vedder (2003). Most states have promulgated long-arm statutes to establish jurisdiction over an out-of-state defendant on the basis of certain acts committed by this out-of-state defendant, provided that the defendant has a sufficient connection with the state.

133 Von Mehren (1980) p.59.

134 *CIBC Mellon Trust Co. v Mora Hotel Corp. N.V.* 296 A D 2d 81(2002), the court held that the exercise of jurisdiction in the foreign proceeding needed to be proper under the law of the court addressed and based on the evidentiary materials presented to the foreign proceeding. See also in *Evans Cabinet Corp v Kitchen* 584 F Supp 2d 410 (2008); *Monks Own Ltd. v Monastery of Christ in the Desert* 142 N M 549 (2007); *Vrozos v Sarantopoulos* 552 N E 2d 1093 (1990).

of origin in order to oppose the recognition of foreign judgments may induce a defendant not to actively defend in the court of origin or even to accept a default judgment.[135] Nevertheless, in the Proposed Federal Statute on the recognition of foreign money judgments, it is provided that "a court should not regard an exercise of jurisdiction as unfair solely because it was founded on a basis that has not been accepted in the United States."[136] This implies that, American courts are still supposed to consider the law of the court of origin, especially in cases where the law of the court of origin can sustain the existence of the jurisdiction of the foreign court.

Also, the Due Process Clause has implications for the court's determination of whether a foreign court has sufficient jurisdiction for recognition purposes.[137] The due process requirement requires that there should at least be "minimal contact" between the defendant and the court, such as "single or occasional actions" within the jurisdiction of the forum or "unrelated actions done in a systematic and continuous fashion".[138] In *Evans Cabinet Corp. v Kitchen*,[139] in a case concerning the recognition of a foreign judgment from the Superior Court of Quebec, it was held that the requirements contained in the Due Process Clause in respect of the examination of personal jurisdiction are as follows: First, the claim underlying the foreign proceeding should be directly derived from or in relation to the defendant's activities in the foreign country. Secondly, the defendant's contacts with the foreign country can represent a purposeful availment of the privilege of conducting activities in the forum state. Thirdly, the exercise of personal jurisdiction against the defendant should be reasonable.[140]

Clearly, the jurisdiction grounds prescribed in the two Uniform Acts satisfy the jurisdiction requirement of the Due Process Clause. However, in situations for which the Acts have not provided, it is left to the discretion of the American courts to refuse recognition of foreign judgments originating from courts who have based their jurisdiction

135 *Osorio v Dow Chemical Co.* 635 F 3d 1277 (11th Cir 2011).

136 §6 Comment c, American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006).

137 Amendment XIV of the US Constitution, Section 1 provides that, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

138 *International Shoe Co v State of Washington, Office of Unemployment Compensation and Placement* 326 U S 310 (1945). The US Supreme Court required that there should be certain minimum contacts to make the defendant subject to a judgment in *personam*.

139 593 F 3d 135 (1st Cir. 2010).

140 Ibid. 146.

on inappropriate grounds even if permitted by the law of the court of origin or the court addressed.[141]

2.5.4 Summary and preliminary comparative remarks

Brussels Ibis, English law and the US law have demonstrated three different approaches to the review of the jurisdiction of the foreign court of origin. Brussels Ibis has a binding jurisdiction system, which directly regulates the jurisdiction of the court of origin. The direct jurisdiction rules lay a sound basis for a limited jurisdiction review by the court addressed.

In contrast, under English and the US law, courts usually apply indirect jurisdiction rules to review the jurisdiction of the foreign courts. The scope of the indirect jurisdiction rules reflects the extent to which a country is prepared to recognize foreign judgments. In this connection, the indirect jurisdiction rules under English law cover a limited number of situations. The rules under English statutes are more restrictive than under the common law in the sense that some grounds that may be considered as exorbitant, such as, the jurisdiction based on the presence of the individual defendant, are excluded.

Under the US law, the Uniform Acts provide for a non-closed list of acceptable jurisdiction grounds for reviewing the jurisdiction of the court of origin. This means that American courts can assess the jurisdiction of the foreign court of origin on a case-by-case basis. Under the common law, American courts may even consider the jurisdiction rules of the court of origin and/or their own direct jurisdiction rules in their assessment of the jurisdiction of the foreign court.

Upon closer reflection, on the one hand, the American approach raises several new problems. For example, how to prove foreign law, how to understand the jurisdiction rules in the state's long-arm statute, how to understand the Constitutional due process requirement in a specific case and so on. Therefore, this approach can be criticized for giving rise to too much discretion of the court addressed as well as to less certainty to the parties involved to predict the fate of foreign judgments before American courts. On the other hand, if these are the price to pay for a more liberal recognition of foreign judgments as compared to its English counterpart, it may still be worth it.

141 Sometimes, state long-arm states provide more extended jurisdiction which might not be permissible by the due process requirement, see in Friedenthal, Kane and Miller (1999) p.141-44; Gul (2006) p.91.

2.6 Fair procedure

Since countries still hold differences in their respective procedural laws, a fair proceeding in one country might not be considered fair in another. For example, a Spanish court may hold that service by means of public notice can only be effective in so far as both the parties and the courts have exhausted all reasonable means of finding out the actual domicile of the defendant,[142] whereas a court in Luxembourg court may consider that service by posting on the court of origin's notice board is sufficient for an effective service of notice.[143] In the light of this fact, courts need to exercise restraint in refusing recognition to a foreign judgment on the grounds of perceived procedural flaws and this accordingly becomes a way to effectively block recognition of foreign judgments. As for the judgment debtors, the entitlement to challenge a foreign judgment on procedural grounds is important since this could protect him in case of a miscarriage of justice.

In general terms, the requirement of a fair procedure for the recognition of foreign judgments mainly concerns procedural safeguards such as: adequate and timely notice of the commencement of proceedings, the opportunity to present argument and evidence, and the determination by a neutral and independent tribunal.[144] The selected frameworks all sustain grounds regarding procedural unfairness for the refusal of recognition of foreign judgments. Some procedural flaws have become independent headings, but others are brought under a more general heading, such as the public policy exception.

2.6.1 Brussels Ibis

Article 81(1) TFEU provides that, "the European Union shall develop judicial cooperation in civil matters having cross-border implications… Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States." This provision reflects the aim of the EU in achieving uniformity and harmonization in private international and procedural law. Even though the EU has made great progress in promoting the harmonization of the procedural laws of the member states,[145] there is a long way to go before true unification. It follows that challenges against the foreign

142 *G R v Robert P N, Audiencia Provincial Madrid*, Base de Datos Aranzadi 2002 nº 132026 http://curia.europa.eu/common/recdoc/convention/en/2003/30-2003.htm accessed 18 July 2021.

143 *Central Bank of Irak v Metzler et Dörries Scharmann AG*, Cour de appel de Luxembourg, Pasicrisie luxembourgeoise 2000 nº 2, p 227-234https://curia.europa.eu/common/recdoc/convention/en/2001/47-2001.htm accessed 18 July 2021.

144 Principles 1, 5, and 30 of the ALI/UNIDROIT Principles of Transnational Civil Procedure 17-18, 22-24, 48-49 (2006).

145 Some instruments have promoted the uniformity of procedural laws in the EU. For example, the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

procedures under Brussels Ibis remain possible and necessary. However, given the fundamental principle of mutual trust and the overarching objective of enhancing the free movement of judgments among the member states, the court addressed can only deny recognition of a foreign judgment which results from a proceeding with significant procedural irregularities and unfairness.[146]

2.6.1.1 Lack of service and notice sufficient to safeguard the defendant's rights

Initially, the Brussels Convention 1968 provided that lack of due service and notice to the defendant is a possible basis for refusal in relation to a foreign default judgment.[147] However the drafters of the Brussels I Regulation 44/2001,[148] intentionally deleted the qualifier "duly" and adopted a functional approach to consider whether the service in the foreign court was effective and whether the defendant's right to defend was effectively respected.[149] It follows that, even if the service at the court of origin was not "duly made" in the sense that it breached requirements under the Regulation on the service of judicial and extrajudicial documents[150] and/or the Hague Convention 1965,[151] it can nevertheless be good service if it sufficiently protects the defendant's rights.[152] In this way, the drafters intended to restrict the use of this provision to exceptional situations where the rights of defence of the judgment debtors have actually been violated. Compared with the Brussels Convention 1968, another notable change in the Brussels I and Brussels Ibis Regulation is the imposition of an additional obligation on judgment debtors to challenge the judgment in the court of origin provided it is possible for him to do so.[153] This change also reflects the objective to restrict as much as possible the scope of application of these grounds for refusal.

2.6.1.2 Manifest breach of the right to a fair trial

Article 6 (1) European Convention on Human Rights (ECHR) and Article 47 EU Charter of Fundamental Rights confirm the right to a fair trial as one of the fundamental principles

146 Hess and Pfeiffer (2011) p.23.

147 Article 27(2) Brussels Convention 1968 provides that, "where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence."

148 Article 34(2) Brussels I and Article 45(1)(b) Brussels Ibis.

149 *ASML Netherlands BV v Semiconductor Industry Services GmbH* [2006] ECR I-12041[20].

150 Regulation No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters.

151 Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters.

152 Layton and Mercer (2004) para.13.24-13.26.

153 Francq (2016) p.915. The Regulation also allows the recognition and enforcement of provisional measures issued by the court which has the jurisdiction on the merits of the case, and it would be refused if the party against whom the provisional measures are sought fails to appear upon the rendition, unless the judgment containing the measure is served to the defendant before enforcement, see in Article 2(a) Brussels Ibis.

of EU law. This principle is closely connected to the fairness of court proceedings, and has been integrated into the Brussels Regime. A manifest breach of the fundamental human right to a fair trial will activate the public policy exception as provided by Article 45(1) (a).[154]

In *Krombach v Bamberski*,[155] Krombach domiciled in Germany was accused of having caused the death of Bamberski's daughter. When he failed to appear before the French criminal law proceedings, the court convicted Krombach and subsequently a civil judgment was also rendered against him without his appearance and defence in respect of a related civil claim. Bamberski sought recognition and enforcement of the French civil judgment on monetary compensation before the German court. The German court referred the question to the ECJ for a ruling as to whether it is contrary to the public policy under Article 27 (1) Brussels Convention 1968 (now Article 45 (1) (a) Brussels Ibis) where the defendant had not been able to defend himself effectively before the foreign court. The ECJ held that the right to defend is one of the fundamental rights under the constitutional traditions common to the member states, the European Court of Human Rights and EC law.[156] Therefore, the court addressed is competent to hold that a refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right.[157]

The case *Gambazzi v Mellon Trust et al* further illustrates what constitutes a "manifest breach of a fundamental right".[158] When the case was before the English court, the court ordered the defendant to disclose details of his assets and some documents on the claim. The defendant failed to comply with the court's order. Therefore, the English court issued an order to exclude the defendant from taking part in the court proceedings. The English court finally rendered a default judgment against the defendant. When the plaintiff sought recognition and enforcement of the English judgment in Italy, the defendant argued that the recognition of judgment should be refused based on the public policy exception since he had been deprived of the right to defend himself before the court.

The ECJ held that the right of defence could be restricted only based on overriding public interests unless such a restriction would not "constitute, with regard to the aim pursued, a manifest or disproportionate breach of the right thus guaranteed".[159] "A manifest

154 Francq (2016) p.895, 917-918.

155 Case C-7/98 (2000) [2000] ECR I-1935.

156 Ibid. Notably, with the entry into force of the Treaty of Lisbon on 1 December 2009, the Charter of Fundamental Rights of the European Union ('the Charter') has become legally binding. The Charter has the same legal value as the Treaties' pursuant to the first subparagraph of Article 6(1) TEU. Article 51(1) of the Charter states that the provisions thereof are addressed to the Member States when they are implementing EU law. Article 47 of the Charter corresponds Article 6 of the European Convention of Human Rights.

157 Case C-7/98 [2000] ECR I-1935, I-1969.

158 *Marco Gambazzi v DaimlerChrysler Canada Inc and CIBC Mellon Trust Company* (Case-394/07) [2009] ECR I-2563.

159 Ibid.

or disproportionate breach" should be determined by treating the foreign proceeding as a whole and by considering all circumstances of the pertinent case. Based on the facts of the case, it should first be considered whether before the defendant was excluded from the proceedings, the obligation of the defendant was established in a due way, whether the defendant has failed this obligation, whether such obligation was necessary to the case, and whether it infringed any rights of the defendant. Second, in terms of the decision that excluded the defendant from the proceedings, did the defendant have any opportunities to challenge it? Third, in terms of the principal claims in the foreign proceedings, had they been examined as to being well-founded, did the defendant have the opportunity to express his opinions on the merits of the case and did the defendant have the right to appeal?[160]

Based on this guidance, the Italian court eventually recognized the English judgment and held that the defendant's right had not manifestly been breached since he should have been more active in the prior proceeding and should have sought remedies before the court of origin.

2.6.2 English law

Under English statute law, the refusal grounds of procedural unfairness mainly concerns service on the defendant. English courts tend to use their own standards to assess whether a service was adequate, regardless of whether it constituted due process under the law of the court of origin. In this connection, the English statutes adopt a similar approach to Brussels Ibis. However, the use of these grounds for refusal under English law seems more flexible than that under Brussels Ibis since it does not require the defendant to make possible challenges before the court of origin.[161] It follows that a judgment debtor can more easily to challenge the effect of foreign judgments based on these grounds than under Brussels Ibis.

Under common law, various types of procedural unfairness can be invoked to resist the recognition of a foreign judgment. However, English courts tend to put all situations under the same heading, i.e. the natural justice exception. It is held that natural justice is

160 Ibid. Notably, following the guidelines given by the ECJ, the Italian court found that the defendant had been given opportunities to contest the jurisdiction and to defend the case on the merits but had decided not to do so. Moreover, it was held by the Italian court that although the exclusion of the defendant from the proceeding was a severe sanction and unknown in Italian law, only when the imposed sanction was disproportionate to the goal of protection of the defendant's right to a fair trial and the right to defence, it can be considered as a violation of the public policy.

161 Article 4(1)(a)(iii)1933 Act. "(iii) the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; or … "

a broad concept.[162] Undoubtedly, lack of service and notice is included in it. Where defendants lack the possibilities to defend themselves before the court of origin, they can invoke the natural justice exception to resist the judgment.[163] If the foreign proceeding is outside "the legitimate expectations of both the plaintiff and the defendant in the context of the procedural rules applicable to the case", it is also against natural justice.[164]

Notably, the use of breach of natural justice as a basis for refusal under common law may be subject to certain preconditions. In *Adams v Cape Industries Plc*,[165] it was held that, where the breach of natural justice is caused by lack of service and notice and by failure to provide the opportunity to defend to the defendant, no matter whether there is a remedy in the foreign court, the judgment can be refused. However, in other situations of procedural impropriety, such as the court used a wrongful way to assess the damages for the plaintiff, English courts are required to consider the existence of other remedies in the foreign court and whether the judgment debtor has sought those remedies.[166] Besides, it has been suggested that, where the jurisdiction of the court is established based on the consent of the defendant, English courts should use the natural justice exception more widely when considering all circumstances of the cases, such as whether the defendant had any remedies in the foreign court.[167] The reason is that the defendant's consent means that he has placed greater reliance on that jurisdiction, however currently English statutes do not involve any considerations of this kind.[168]

2.6.3 The US law

2.6.3.1 Unfairness of the foreign judicial system

Among the selected three frameworks, the US law is the only one that provides grounds for refusal based on the unfairness of the foreign judicial system. The 1962 Act and 2005 Act both provide that, if a judgment was rendered under a judicial system that does not

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162 *Adams v Cape Industries Plc* [1990] Ch 433, 498: "He was limiting natural justice objections to objections based upon the procedure that had been adopted, but that, in my opinion, is the only limitation that can be spelled out of the judgment. The criterion whether 'the procedure of this foreign court did offend against our principles of substantial justice,' is a broad one."

163 *Robinson v Fenner* [1913] 3 KB 835, 842-843: "it is not enough, therefore, to say that the result produces an injustice in the particular case, because a wrong decision always does. So far as I can see, all the instances given of what is 'contrary to natural justice' for the purpose of preventing a foreign judgment being sued on here are instances of injustice in the mode of arriving at the result, such as deciding against a man without hearing him or without having given him any notice or the like", confirmed by *Jacobson v Frachon* 138 L T 382 (1927) (CA).

164 Ibid.

165 *Adams v Cape Industries Plc* [1990] Ch 433, 569.

166 Ibid.

167 Dicey, Morris and Collins (2016) p.742.

168 Section 9 (2) (c) 1920 Act and Section 4 (1) (a) (iii) 1933 Act.

provide impartial tribunals or whose procedures are not compatible with the requirements of due process of law, the judgment can be refused.[169] Nevertheless, American courts are reluctant to use these grounds for refusal to defeat a foreign judgment.[170]

This rule was first established in *Hilton v Guyot*,[171] in which the judgment debtor questioned the fairness of the French judicial system in respect of examining witnesses. The U.S. Supreme Court held that the difference in procedure between the court addressed and the court of origin cannot defeat the fairness of a foreign judicial system. It was further held that a judgment debtor must meet a high burden of proof to show that a foreign judicial system could not provide impartial tribunals or procedures compatible with due process so as to defeat the foreign judgment.[172] It can be found that, only where there is a breakdown of the civil order or events like wars, American courts may use this ground to question the impartiality of the foreign legal system.[173]

2.6.3.2 Lack of service and other unfairness in foreign procedures

The lack of service constitutes an independent ground for refusal under the US law.[174] Where the defendant has not received timely notice of the foreign court proceedings so as to enable him to defend himself, the subsequent judgment can be denied recognition. In this regard, there is not much difference between Brussels Ibis and English statute law, as American courts also assess the service process based on the fact whether the service is sufficient enough to allow the judgment debtor to raise an adequate defence, regardless of whether or not the service complies with the foreign rules on service of process.[175] In cases where the foreign court's jurisdiction satisfies American standards, American courts tend to respect foreign procedural law on service and notice.[176] In *Tahan v Hodgson*, even though the notice served on an American in Israel was written in Hebrew, the court considered the jurisdiction of the foreign court proper and regular, and recognized the Israeli default judgment.[177]

Apart from refusal based on a lack of effective notice, the 2005 Act adds two grounds based on the unfairness of the specific proceeding of the foreign court. One concerns the

169 Section 4 (a) (1) 1962 Act; Section 4 (b) (1) 2005 Act.
170 Reporters' Notes 2 § 483 Restatement (Fourth) of Foreign Relations Law (2018).
171 159 U S 113, 202 (1895).
172 *DeJoria v Maghreb Petroleum Exploration, SA* 804 F 3d 373, 382 (5th Cir 2015).
173 *Bridgeway Corp v Citibank* 45 F Supp 2d 276, 287 (S D N Y 1999); *Osorio v Dow Chem Co* 635 F 3d 1277, 1279 (11th Cir 2011).
174 Section 4 (c) (1) 2005 Act; Section 4 (b) (1) 1962 Act; *Hilton v Guyot* 159 U S 113, 202 (1895): "after due citation or voluntary appearance of the defendant."
175 *Galliano, S A v Stallion, Inc* 930 N E 2d 756, 759 (N Y 2010), see also § 484 Comment c, Restatement (Fourth) of Foreign Relations of Law (2018).
176 § 481 Reporters' Notes 4 Restatement (Third) of Foreign Relations of Law (1987).
177 662 F 2d 862 (1981), see also in *Bank of Montreal v Kough* 612 F 2d 467 (9th Cir 1980).

situation where undue influence, improper pressure, or inducement was exerted on the court of origin which affected the integrity of the foreign court, such as bribery of the judge.[178] The other is that the specific proceedings of the court of origin are incompatible with the due process of law,[179] such as denying one party a fair opportunity to present its case.[180] By such replenishment, the judgment debtors have more certain grounds to rely on to resist the recognition of foreign judgments.

2.6.4 Summary and preliminary comparative remarks

All selected frameworks include refusal grounds based on procedural unfairness. This includes violation of procedural rights of the defendants, i.e. lack of effective service and lack of opportunity for the defendant to defend his case before the court. Only Brussels Ibis imposes an additional obligation upon defendants to seek remedies before the court of origin. If the defendant himself is to blame for the violation of his rights of defence, he should not benefit from this violation to deny recognition to the foreign judgment.

Under English and the US law, procedural unfairness covers more situations. An unexpected procedure in a foreign court may lead to the refusal of recognition of the foreign judgment before an English court, whereas American courts can deny recognition to a foreign judgment either based on defects in the foreign judicial system in general or in the specific court proceedings.

2.7 Fraud

2.7.1 Brussels Ibis

Under Brussels Ibis, fraud is not a separate refusal ground. As explained in the Schlosser Report,[181] the defence of fraud as grounds to deny recognition to a foreign judgment is subsumed by the public policy exception.[182] Therefore, fraud is subject to the restricted interpretation of the public policy exception.[183]

According to the Schlosser Report,

178 Section 4 (c) (7) and Comment 11 2005 Act.
179 Section 4 (c) (8) and Comment 12 2005 Act.
180 Reporters' Notes 9 § 484, Restatement (Fourth) of Foreign Relations Law (2018).
181 Peter Schlosser, 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice' (OJ, 1979) C 59/71 (Hereafter: Schlosser Report).
182 Ibid.
183 See Chapter 2 Section 2.6.1.2 and Section 2.8.1.

> "The 1968 Convention does not state in terms whether recognition may be refused pursuant to Article 27 (1) on the ground that the judgment has been obtained by fraud. Not even in the legal systems of the original Contracting States to the 1968 Convention is it expressly stated that fraud in obtaining a judgment constitutes a ground for refusing recognition. Such conduct is, however generally considered as an instance for applying the doctrine of public policy…In the conventions on enforcement which the United Kingdom concluded with Community States, a middle course was adopted by expressly referring to fraudulent conduct, but treating it as a special case of public policy…However, the legal systems of all Member States provide special means of redress by which it can be contended, even after the expiry of the normal period for an appeal, that the judgment was the result of a fraud ... a court in the State addressed must always, therefore, ask itself whether a breach of its public policy still exists in view of the fact that proceedings for redress can be, or could have been, lodged in the courts of the State of origin against the judgment allegedly obtained by fraud."[184]

It follows from the above citation that one of the preconditions that must be met before fraud can be invoked as grounds to refuse recognition to a foreign judgment under Brussels Ibis is to determine whether any proceedings for redress in the court of origin were used or could have been used. If such means of redress existed but have not been used, recognition should not be refused on the basis of fraud. Furthermore, the prohibition of review of the substance of the case under Brussels Ibis limits the possibility to invoke fraud even more, if the alleged fraud has already been considered and decided by the court of origin.[185]

2.7.2 English law

Under English law two approaches have emerged with regard to the requirements for invoking the defence of fraud. This first view considers the issue of fraud as an absolute defence. Even if there is no new evidence and the issue of fraud has already been decided in the foreign proceedings, parties may nevertheless invoke fraud to impeach the foreign

184 Schlosser Report C 59/71, para. 129.
185 Francq (2016) p.889.

judgment.[186] In *Owens Bank Ltd v Bracco*,[187] the House of Lords distinguished between the different approaches towards domestic and foreign judgments and reaffirmed that fraud is an absolute defence against the foreign judgment. Nevertheless, it has also been held that since this rule is against the principle of finality, if recognition of a foreign judgment is sought under the English statutes, it is not proper to use this rule to defeat the foreign judgment.[188]

The other approach argues that fraud as grounds to set aside a foreign judgment cannot be applied unconditionally. As held by Lord Campbell C.J., it is contrary to the principle of expediency to raise the issue of fraud to impeach a foreign judgment.[189] Therefore, the strict requirements on fraud as grounds for the impeachment of domestic judgments should be applied to foreign judgments as well. These requirements are: firstly, that there should be newly discovered evidence, which could not have been produced in the previous trial with reasonable diligence.[190] Secondly, the evidence should be material to the final result, i.e. it should have had an impact on the outcome of the previous proceedings.[191] Recently, the English Court of Appeal has added the qualification "conscious and deliberate dishonesty", in order to further define the scope of behaviour during the earlier proceedings that can considered as fraud.[192]

In recent years, in a case appealed before the Privy Council, it was held that versatile rules should be established particularly for foreign judgments, which are suitable for various legal systems, for the various types of fraud as well as for the scope of challenge before the foreign court.[193] This seems to be a moderate view in between the above two approaches.

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186 *Abouloff v Oppenheimer* 10 QBD 295 (1882): "the question for the courts of this country to consider is whether, when a foreign judgment is sought to be enforced by an action in this country, the foreign court has been misled intentionally by the fraud of the person seeking to enforce it, whether a fraud has been committed upon the foreign court with the intention to procure its judgment … that the courts of this country in dealing with a foreign judgment will not inquire whether the foreign court pronounced a judgment correct in point of law, or right and accurate in point of fact … We are to decide whether the courts at Tiflis have been misled by the fraud of the plaintiff; but the question whether they were misled, never could have been submitted to them, never could have been in issue before them, and therefore never could have been decided by them. The English courts are not either retrying or even re-discussing any question which was or could have been submitted to the determination of the Russian courts." See also *Price v Dewhurst* 59 ER 111 (1837), it was held that if the court found a foreign proceeding had been fraudulent, the court was at liberty to deal with the parties and the subject as if no foreign judgment existed.

187 [1992] 2 AC 443 (HL).

188 *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44 (PC). In this case, the court raised an opposition against *Owens Bank Ltd v Bracco*, which held that the use of the defence of fraud under the English statutes should follow the common law, especially the rules established by *Abouloff v Oppenheimer*.

189 Ibid.

190 *Takhar v Gracefield Developments Ltd* [2017] EWCA Civ 147; *Chodiev v Stein* [2015] EWHC 1428 (Comm); *Hunter v Chief Constable of the West Midlands* [1980] QB 283 (CA).

191 *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44.

192 *Royal Bank of Scotland v Highland Financial Partners LP and others* [2013] EWCA Civ 328 (CA).

193 *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7.

2.7.3 The US law

In considering whether a judgment concerns a fraud, American courts generally do not distinguish between foreign judgments and domestic judgments, but make a distinction between "extrinsic fraud" and "intrinsic fraud".

Extrinsic fraud refers to cases where "the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side".[194] Clearly, the concept of extrinsic fraud is quite close to that of procedural unfairness, since most of the listed situations essentially concern the violation of a party's procedural rights.[195]

By contrast, intrinsic fraud is of a substantive nature. It mainly concerns fraud in the sense of knowingly making use of perjured testimony, fabricated evidence, fraudulent instruments and so on.[196] Bearing in mind that issues that have been considered should not be reopened, the court held that intrinsic fraud that has already been decided on by the previous court should not be admitted as grounds of defence to impeach a judgment.[197]

However, in some American decisions it is found that a simple categorization of fraud is not suitable in every case. It is just a "nice distinction" that the court is not obliged to follow.[198] For example, fabricated evidence may prevent a party from a full presentation and defence in court proceedings. Furthermore, the simple categorization may cause injustice in circumstances where there is only intrinsic fraud although it has equivalent consequences as extrinsic fraud. In the light of this, this distinction between extrinsic and intrinsic fraud was abandoned in the law on the impeachment of domestic judgments,[199] and in the law on recognition of foreign judgments.[200] It has been held that in order to justify the setting aside of a judgment for fraud, rather than considering the distinction of extrinsic and intrinsic fraud, it must be considered whether a fraud has been committed and has prevented the defrauded party from making a full and fair defence.[201] Further, it

194 *US v Throckmorton* 98 US 61 (1878).
195 *Laufer v Westminster Brokers, Ltd* 532 A 2d 130 (D C App 1987).
196 Ibid.
197 Ibid.
198 *Toledo Scale v Computing Scale Co* 261 U S 399, 421
199 § 70 and Comment c, Restatement (Second) of Judgments.
200 In Section 4 (b) (2) 1962 Act and Section 4 (c) (2) 2005 Act, there is no categorization of fraud, nonetheless in Section 4 Comment 7 2005 Act, it still mentions that the intrinsic fraud should be decided by the court of origin. Reporters' Notes 3 § 484 Restatement (Fourth) of Foreign Relations Law (2018).
201 Section 4 Comment 7 2005 Act.

is relevant whether the complaining party was at fault or negligent in being defrauded, and more importantly, whether this fraud has been considered and decided upon in the previous proceeding.[202]

2.7.4 Summary and preliminary comparative remarks

Based on the above, Brussels Ibis and the US law share a similar line of thinking. In both, fraud can either affect the procedural fairness of the foreign proceeding, or the substantive correctness of the foreign judgment.[203] Brussels Ibis and the US law both exclude fraud as a defence against the substantive correctness of foreign judgments but recognize fraud as a defence against procedural unfairness in the foreign proceedings.

Of the three legal systems, English courts take a confusing approach. It is understandable that courts in earlier times treated foreign judgments differently from domestic judgments and laid down a lower standard for the invoking the defence of fraud against foreign judgments. However, today it seems improper to still retain this old rule for foreign judgments. It is difficult to comprehend why the House of Lords – after realizing that the finality of litigation is frustrated if the defence of fraud is admitted too easily – nevertheless continues to allow the defence of fraud to be raised so easily against foreign judgment.

2.8 Public policy exception

Where the recognition of a foreign judgment would violate the fundamental moral values and principles within the legal order of the country of the court addressed, recognition of a foreign judgment may be refused. In the context of Brussels Ibis, this is known as the substantive public policy exception,[204] in contrast to the procedural public policy exception. Under English law and the US law, the public policy exception mainly refers to situations involving a breach of moral principles and fundamental rules.[205]

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202 *Harrison v Triplex Gold Mines* 33 F 2d 667, 671(1929).

203 Even though the US law abandons the categorization as to extrinsic and intrinsic fraud, its postulation is not changed. The reason to abandon the categorization is mainly because they noticed that intrinsic fraud can also lead to procedural unfairness.

204 Commission Impact Assessment accompanying document to the Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters Recast SEC (2010) 1547 final 46. It divided public policy into two types, namely, procedural public policy refers to the situation where the foreign procedure runs against the basic legal principles of a State. Substantive public policy relates to an irreconcilability of the substance of the foreign judgment with the basic principles of the State.

205 Dicey, Morris and Collins (2016) p.735; Section 9 (2) (f) 1920 Act; Section 4 (1) (v) 1933 Act; Section 4(b) (3) 1962 Act; Section 4 (c) (3) 2005 Act; Reporters' Notes 4 § 484 Restatement (Fourth) of Foreign Relations of Law (2018).

2.8.1 Brussels Ibis

The concept of public policy under Brussels Ibis has two facets, the one is procedural, and the other substantive. However, cases regarding the substantive public policy exception are rare. The connotation of substantive public policy mainly depends on the understanding of each member state.[206] Where the effects of recognition of a foreign judgment (rather than the foreign judgment itself) are manifestly contrary to the public policy of the court addressed, the judgment should be refused.[207]

For several reasons the scope of the substantive public policy refusal ground under Brussels Ibis is narrow. First, Brussels Ibis prohibits any review of the substance of foreign judgments.[208] It follows that the public policy exception only concerns infringements that "would have to constitute a manifest breach of a rule of law regarded as essential in the legal order…or of a right recognized as being fundamental within that legal order."[209] Second, due to the fact that the divergences between substantive civil and commercial laws of the member states are not significant, it seems that the substantive public policy exception can only have minor importance.[210] Therefore, it is no surprise that the refusal on the grounds of substantive public policy is barely upheld in case law of the ECJ and national courts.[211]

Before Brussels Ibis was adopted, the European Commission had even proposed to abolish the substantive public policy exception in order to enhance the recognition and enforcement of foreign judgments under Brussels Ibis.[212] However, it was suggested that in certain sensitive areas, such as in defamation cases, divergences between substantive laws are still apparent. The effect of foreign judgments could have an impact on fundamental rights, such as human dignity, respect for privacy family life, protection of personal data,

206 Jenard Report C 59/44; Francq (2016) p.882.

207 Francq (2016) p.883.

208 Article 52 Brussels Ibis.

209 *Krombach v Bamberski* (Case C-7/98) (2000) [2000] ECR I-1935, I-1965, [37]; *Trade Agency Ltd v Seramico Investments Ltd* (Case C-619/10) [2012] ECLI:EU:C:2012:531, [48]; *flyLAL-Lithuanian Airlines AS* (Case-302/13) (2014) ECLI:EU:C:2014:2319 [49].

210 Francq (2016) p.883.

211 *Krombach v Bamberski* (Case C-7/98) (2000) [2000] ECR I-1935; *Renault v Maxicar* (Case C-38/98) [2000] ECR I-2973; In: *Meletis Apostolides v David Charles Orams* (Case C402/07) (2009) ECR I-3571, the recognition of the Cypriot judgment against the English defendant regarding the possession of land in the northern area where the Cyprus Government does not have effective control infringes none of the fundamental principle within the legal order of the United Kingdom; also see in Hess and Pfeiffer (2011) p.153.

212 Commission Impact Assessment accompanying document to the Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters Recast SEC (2010) 1547 final 15: "the only exceptions relate to substantive public policy … The former ground of refusal no longer seems necessary because to the knowledge of the Commission there has not been a single case since the entry into force of the Brussels Convention where recognition and enforcement of a judgment has been refused for this reason."

and freedom of expression and information. Therefore, the substantive public policy was still deemed necessary.[213]

Based on case law, in the following situations, application of the public policy exception would be denied: First, to invoke the public policy exception where it only concerns differences in legislation between two countries.[214] Second, to invoke the public policy exception where the court of origin erred in applying the law.[215] Third, to invoke public policy exception where the judgment concerned an extremely high amount.[216]

2.8.2 English law

English courts tend to assess the basis of foreign judgments before deciding whether the judgment is against public policy. For different types of judgments, the criteria whether the basis is contrary to the English public policy vary.

In *Rousillon v Rousillon*,[217] the court held that where the underlying contract or rights are deemed void under English law, the judgment could be refused on the ground of contradicting public policy. In *Israel Discount Bank of New York v Hadjipateras*,[218] the Court of Appeal affirmed the holding of *Rousillon v Rousillon* and considered that foreign judgments based on a contract obtained by undue influence or coercion were also against public policy. Furthermore, it was held that the question of public policy may only arise where the law or practice of the foreign country differs from the public policy of the English court. If foreign law is consistent with English law, and the party failed to raise the evidence

213 Ibid.

214 *Krombach v Bamberski* (Case C-7/98) (2000) [2000] ECR I-1935. Also, it is reported that cases involving argument of substantive public policy exception were rarely with successful. For example, the German court recognized and enforced an Italian judgment in which non-material damages to a moral person for the infringement of personality rights was granted even though under German law such damage was not existed, also see in Hess and Pfeiffer (2011) p.153.

215 In: *Renault v Maxicar* (Case C-38/98) [2000] ECR I-2973, the French judgment sought enforcement a judgment condemning the Italian manufactured for infringing the exclusive intellectual property rights that were granted under French law. The Italian judgment debtors argued that the enforcement was against the fundamental principles of Community law, the free circulation of goods and the prohibition of abuse of dominant position. The ECJ held that errors in applying the law in the court of origin do not justify a breach of a rule of law regarded as essential in the legal order of the court addressed.

216 For example, the Swedish Supreme Court gave recognition and enforcement of a Romanian court decision in respect of compensation for a traffic accident though the damage amount awarded was nine times higher than could be allowed under Swedish law, see in Hess and Pfeiffer (2011) p.153.

217 (1880) 14 Ch D 351:" agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and they are made on good consideration, and are reasonable."

218 [1983] 2 Lloyd's Rep. 490 (CA).

of "illegal acts" in the foreign proceedings, public policy cannot be employed to refuse recognition to the foreign judgment.[219]

For judgments regarding family affairs, the threshold for applying the public policy exception seems lower. The basis of the foreign judgment need not be illegal or immoral, and sometimes an unknown cause of action can already justify a public policy exception. *Chaudhary v Chaudhary* concerned the recognition of a foreign divorce decree.[220] Considering that the foreign judgment would lead to the immoral escape from his financial obligation by the husband, the court refused to recognize the decree on the basis of public policy. In *In Re Macartney*,[221] the court realized that the cause of action of the foreign judgment was not "directly contrary to general morality" nor illegal under English law, but nevertheless refused recognition of a Maltese judgment on maintenance fees against a deceased defendant since the cause of action was unknown to the English court.

2.8.3 The US law

Under the US law, the number and the type of cases where foreign judgments are refused recognition on the basis of the public policy exception are limited. It has been held that the narrow scope of public policy reflects that American courts intend to respect the finality of foreign judgments.[222]

Where recognition of foreign judgments "injures the public health, the public morals, the public confidence in the purity of the administration of law, or ... undermines the sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel," American courts consider it as against the public policy.[223] In *Society of Lloyd's v Turner*,[224] "a high level of contravention of Texas law" justified the public policy exception.

219 In this case, the second defendant claimed that the signing of the guarantee and his submission to the jurisdiction of the New York courts were under the undue influence of his father, the first defendant. However, the court held that the second defendant intentionally omitted to raise the issue of undue influence in the American proceeding, therefore, the judgment could not be refused on the ground of public policy.

220 [1984] 3 All ER 1017 (CA).

221 [1921] 1 Ch 522.

222 *Ackerman v Levine* 788 F 2d 830, 842 (2nd Cir 1986).

223 Ibid.

224 303 F 3d 325, 331-32 (5th Cir 2002).

It can be generalized that the successful invocation of public policy to refuse recognition to foreign judgments mainly concerns certain types of judgments, namely libel judgments,[225] judgments involving penal sanctions and taxes,[226] and judgments on family affairs.[227]

Unlike English law, American courts do not pay much attention as to whether the underlying cause of action is valid under the US law. For example, a foreign judgment concerning attorney fees and court costs was held not to violate public policy even though the underlying cause of action was not allowed in the US law.[228] In *International Hotel Corp. v Golden*,[229] a foreign judgment from Puerto Rico was based on a gambling contract. The court did not go into the cause of action of the foreign judgment and only considered whether the effect of the foreign judgment would violate public policy. The court finally held that public policy did not affect the enforcement of a gambling obligation validly entered in a foreign country.

2.8.4 Summary and preliminary comparative remarks

Given the prohibition of any review of the substance of judgments as well as the strict interpretation of public policy under Brussels Ibis, the situations with cases concerning the substantive public policy exception are very rare. Under English law, if the underlying cause of action is null and void or illegal from the perspective of English law, public policy can be used to refuse recognition to a foreign judgment. In some cases, even though the underlying cause of action is not illegal and immoral, judgments can still be refused recognition based on the public policy exception. By contrast, under the US law, the

225 There is a list of cases concerning the refusal of libel judgment on the ground of public policy. *Bachchan v India Abroad Publications Inc* 585 N Y S 2d 661(1992); *Matusevitch v Telnikoff* 877 F Supp 1(1995); *Sarl Louis Feraud International v Viewfinder Inc* 489 F 3d 474 (2nd Cir 2007). In these cases, the foreign judgments is considered repugnant not only to for the public policy but also to the constitutional rights of American citizens provided for in the U.S. Constitution, i.e. the protection against free speech. Therefore, it was held that such refusal of recognition is "constitutionally mandatory".

226 *Republic of the Philippines v Westinghouse Electric Corp* 821 F Supp 292 (D N J 1993). In this case, the New Jersey District Court refused to enforce a foreign judgment containing a sanction against the judgment debtor. Also in *Overseas Inns S A P A v United States* 911 F 2d 1146 (5th Cir 1990), the case concerns foreign judgment on unpaid taxes. It is notable that the Restatement and the Uniform Acts have explicitly said that foreign judgment regarding taxes, fines, and penalties should be excluded from recognition.

227 For example, in *De Brimont v Penniman* 7 F Cas 309 (1873), a French judgment in which an American couple were ordered to pay the daily expenses for their son-in-law and their grandchild after their daughter died. It was held by the court that such obligation contained in the judgment would do violence to the rights of American citizens and was a violation of the policy of the laws of the United States.

228 In: *Somportex Ltd v Philadelphia Chewing Gum Corp* 453 F 2d 435 (3rd Cir 1971) the court awarded a British judgment in respect of attorney's fees); *Spann v Compania Mexicana Rediodifusora Franteriza* 131 F 2d 609 (5th Cir 1942) (award a Mexican judgment in respect of attorney's fees; In: *Browne v Prentice Dry Goods, Inc* 1986 WL 6496 (S N D Y 1986) the court awarded an Argentinean judgment in respect of attorney's fees.

229 15 N Y 2d 9 (1964), see also *Robinson Property Group, L P v Russell* 2000 WL 33191371.

application of the public policy exception is limited to a few types of cases. Moreover, American courts do not consider the underlying cause of action of foreign judgments, but rather focus on the effects of recognition, to decide whether a foreign judgment is contrary to public policy.

2.9 Existence of another irreconcilable or conflicting judgment

Since parallel proceedings cannot entirely be prevented, the court addressed may be confronted with situations where a foreign judgment if recognized would conflict with another judgment. This other judgment may be a judgment from the court addressed or from another court within its jurisdiction, but also another conflicting foreign judgment from a third country for which recognition is sought. In such cases, the court addressed has to choose which judgment to grant recognition to.

2.9.1 Brussels Ibis

One of the main objectives of Brussels Ibis is to avoid irreconcilable judgments from courts in the member states since this enhances the mutual recognition and enforcement of judgments from courts in the member states.[230] Bearing this in mind, the drafters adopted the *lis pendens*-rule and the related action-rule to preclude parallel proceedings. Despite this, irreconcilable judgments can still come into existence.

Article 45 (1)(c) and (d) Brussels Ibis gives two separate rules about recognition in case of irreconcilable judgments. Where a foreign judgment is irreconcilable with a judgment given between the same parties in the country of the court addressed, the local judgment shall prevail, regardless of which of the judgments was decided earlier. Apparently, this rule serves the need to protect local interests in the country of the court addressed. The other rule holds that where recognition of a foreign judgment is irreconcilable with an earlier judgment capable of being recognized either from another member state or a third state involving the same cause of action and between the same parties, recognition of the foreign judgment given at the later date will be refused.[231] This rule is usually called the first-in-time rule. The explanation is that when the first judgment was rendered, nothing remained for the later judgment to decide.[232]

230 Recital 21 Brussels Ibis says, "in the interests of the harmonious administration of justice it is necessary to minimize the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States … " In the Jenard Report C59/41, it is also viewed that competing judgments that would hamper the free and easy movement of judgments, should be avoided

231 Article 45 (1) (c) and (d) Brussels Ibis.

232 Hay (2018) p.163.

Thanks to the *lis pendens*-rule and the related actions-rule with regard to parallel proceedings, it is rare for conflicts between irreconcilable judgments to be raised under Brussels Ibis. For example, a judgment ordering a financial payment between a husband and a wife was held irreconcilable with a judgment dissolving the marriage.[233] In another case, an interim judgment restraining a party from acting was considered irreconcilable with a judgment which refused to give an order to the same effect.[234]

2.9.2 English law

English statute law does not pay much attention to the possibility of conflicting judgments. Section 4(1) (b) 1933 Act provides that, if the matter in dispute in the proceedings in the original court has previously been the subject of a final and conclusive judgment by a court having jurisdiction in the matter, the English court should refuse recognition.[235] This provision follows the first-in-time rule without giving precedence to local judgments.

Under the common law, a foreign judgment that conflicts with a prior English judgment will be refused recognition. In *Vervaeke v Smith*[236] a prior English decision had confirmed the validity of a couple's marriage, whereas a Belgian court later held that their marriage was void. The House of Lords sustained the prior English judgment and held that the Belgian judgment was against public policy and the principle of *res judicata*. In another case,[237] an English court dismissed a declaratory action that the defendant was not bound by the contract. After that, an Indonesian court gave judgment in favour of the defendant, declaring the contract to be illegal. Later, the English Court of Appeal denied recognition to the Indonesian judgment based on the public policy exception.[238] Moreover, it has been suggested that an English judgment will always prevail over a foreign judgment, regardless of the time sequence.[239]

In cases where two final but competing foreign judgments compete for recognition, English courts tend to favour the earlier judgment over the later decided judgment. In *Showlag v Mansour*,[240] the Privy Council referred to Section 34 1982 Act and the House of Lords ruling in *India Grace* case,[241] and held,[242]

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233 *Hoffmann v Krieg* (Case145/86) [1988] ECR 645.
234 *Italian Leather SpA v WECO Polstermöbel GmbH & Co* (Case C-80/00) [2002] ECR I-4995.
235 Section 4 (1) (b) 1933 Act.
236 [1983] 1 AC 145 (HL).
237 *ED & F Man (Sugar) Ltd v Haryanto (No.2)* [1991] 1 Lloyd's Rep 429 (CA).
238 Ibid.
239 Clarkson and Hill (2006) p.153.
240 [1995] 1 AC 431 (PC).
241 *Republic of India v India Steamship Co Ltd; The Indian Endurance and the Indian Grace* [1993] AC 410 (HL).
242 [1995] 1 AC 431.

> "Republic of India v. India Steamship Co. Ltd. was, of course, a case where a foreign judgment was founded on as creating a bar per rem judicatam to proceedings in England by a plaintiff relying on the same cause of action. But similar principles must fail to be applied where the domestic court is dealing with two competing foreign judgments. If there are circumstances connected with the obtaining of the second judgment which make it unfair for the party founding on the first to seek to enforce it, then it may be proper to refuse to allow him to do so."[243]

2.9.3 The US law

Prima facie, the solution given by the two Uniform Acts under the US law is quite similar to that in English statute law,[244] which confirms the first-in-time rule and gives no priority to local judgments. However, under the common law, American courts tend to use an entirely different approach from Brussels Ibis and English law, i.e. the last-in-time rule. This rule was borrowed from the inter-state setting. It means that where two judgments conflict, American courts shall give recognition to the later one decided one.[245] The rationale of this rule is that parties have the opportunity either to argue against the effect of the first judgment in the second proceeding or to appeal from that judgment in the state of origin.[246] Therefore, where a prior judgment is not relied upon in the second proceedings, the second judgment should be conclusive even though it is inconsistent with the first judgment.[247] Following this logic, there are many decisions in which American courts recognize foreign judgments despite the existence of a prior conflicting American judgment or a judgment from a third country.[248] This rule assumes that the second court will consider the earlier judgment.[249] However, in cases concerning two judgments from different countries, it is doubtful whether the second court will consider the earlier judgment.

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243 Ibid.

244 Section 4 (b) (4) 1962 Act; Section 4 (c) (4) 2005 Act.

245 §15 Restatement (Second) of Judgments (1982); §114 Restatement (Second) of Conflict of Laws (1971).

246 §114 Comment b, Restatement (Second) of Conflict of Laws (1971).

247 §15 Comment b, Restatement (Second) of Judgments (1982).

248 In: *Ackerman v Akerman* 517 F Supp 614 (S D N Y 1981) the court applied the last-in-time rule and recognizing the English judgment even though it had conflicts with a prior California judgment; *Ambatielos v Foundation Co* 116 N Y S 2d 641(1952): "recognition of British judgment, sued on in the Supreme Court, for an amount found to be the plaintiff from the defendant for services rendered under an oral contract after an inquiry ordered by prior British judgment for the plaintiff, should not be denied solely because of existence of an intermediate Greek judgment for the defendant in the plaintiff's action on both the original British judgment and oral contract, as the latest judgment is determinative of parties' rights".

249 Smit (1962) p.46.

Given the loopholes, as shown above, the proposal for a Federal Statute adopts a combined approach to deal with the situations where two foreign judgments conflict with each other. It is proposed that,

> "The court in the United States should inquire whether the judgment asserted to be inconsistent was submitted to the rendering court. If so, and if the court that rendered the judgment being presented considered the other judgment or proceeding and declined to recognize it under standards substantially comparable to the standards set forth in this Act, the court in the United States should ordinarily recognize and enforce the judgment presented; if the court that rendered the judgment presented did not fairly consider the other judgment, the court in the United States may, in inappropriate circumstances, decline to recognize the judgment presented."[250]

This combined approach concerns two main situations. Where the court of the latter judgment reasonably considers the effect of the earlier inconsistent judgment, American courts should give recognition to the later judgment. Alternatively, if the court of the later judgment did not consider the effect of the earlier inconsistent judgment, American courts may refuse to recognize the later one and recognize the earlier one instead. Moreover, the Federal Statute proposes that local judgments should be given more weight, no matter the local judgment was given earlier in time.[251] Furthermore, if the case concerns neither situation, the court should first consider which action was first commenced, which judgment was first rendered, and whether either party had the opportunity to present the competing action or judgment for consideration by the other court, as well as the relationship of the underlying judgments to each other, before deciding which judgment should be recognized.[252]

2.9.4 Summary and preliminary comparative remarks

Brussels Ibis and English law both opt for the first-in-time rule to solve the situation of conflicting judgments in order to respect the finality of the prior judgment, subject to the proviso that local judgments must always prevail. However, the first-in-time rule may lead to a race to the judgment. As the first-in-time rule ignores why the second proceeding was instituted, and whether the second proceeding has considered the effect of the first

250 § 5 Comment j, American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006).
251 Ibid.
252 Ibid.

judgment, it also gives rise to doubts as to whether the time sequence of judgment is so vital. What if the second proceeding was initiated much earlier than the first proceeding, but the second judgment is given merely one day later than the first?

In contrast, American courts are not confined to the first-in-time rule and show their willingness to examine the connections between the first and second judgment. They also tend to explore the circumstances that give rise to the inconsistency. Specifically, if the case concerns two conflicting judgments, American courts will examine whether the court that gave the latter judgment has properly considered the prior judgment. If the later judgment was rendered based on the consideration of the prior one, American courts are likely to recognize the later judgment. If not, the first judgment may be recognized at the court's discretion. In this way, the time sequence is no longer the decisive element that leads to the non-recognition of foreign judgments.

2.10 Concluding remarks

Even though all the selected jurisdictions have the same goal of enhancing transnational transactions and are willing to respect the effect of foreign judgments, there are still differences in their views towards recognition of foreign judgments.

Brussels Ibis is undoubtedly the most favourable framework to foreign judgments. It must be noted how Brussels Ibis achieves the effectiveness of its recognition regime. The rules under Brussels Ibis are consistent and interconnected with the same purpose of promoting the free movement of foreign judgments. The uniform and binding jurisdiction rules are fundamental. As discussed, the jurisdiction rules enhance the recognition mechanism in that they pave the way for the limited review of jurisdiction within its framework. Moreover, the refusal grounds are limited and have been strictly interpreted by the ECJ. Due to the principle of prohibiting review of the substance of the case, the refusal grounds mainly concern procedural unfairness. The strict interpretation requires that only manifest breaches of the procedural rights of parties can lead to the non-recognition of foreign judgments. Moreover, a party whose procedural rights have been infringed in the court of origin can only invoke refusal grounds if he has made efforts to seek remedies in the court of origin.

English law, compared with the other two, is in between the two and fairly friendly to foreign judgments. The rules for recognition in current English law date back to the 19th Century, and some of them seem outdated, such as the rules for jurisdiction review and the rules on the defence of fraud. Notably, Canadian courts have already made some changes to the traditional rules for jurisdiction review, which originally were derived from

English law.[253] It has been suggested that the traditional rules are "dated and parochial" since they may close the door to embrace foreign judgments arising from the appropriate forum.[254] However, there are two sides to every coin. Even though the rules are somewhat outdated, they do provide stability and predictability. As there are no big changes in the rules, it is easy for parties to decide their litigation strategy at the beginning of the suit.

The US law, is regularly updated and is superior in several aspects, such as an understanding of the fraud defence, the limited application of public policy exception, however clearly the US law on the recognition of foreign judgments still evolves towards increased discretion of the court addressed.[255] Therefore, in my view it is the least favourable to foreign judgment recognition. This can be demonstrated by the adoption of a new basis for refusal, i.e. the judgment was rendered in circumstances that raised substantial doubt about the integrity of the rendering court with respect to the judgment,[256] and can be shown by the fact that the US law allows the courts to use their discretion to review the jurisdiction of the foreign court,[257] or even rely on the ground of inconvenient forum to refuse recognition of a foreign judgment.[258] Although the discretionary power of American courts can be justified by the increasing possibilities that the jurisdiction of a foreign court may be accepted, in my view the excessive discretionary power of American courts is the most troubling factor that frustrates the cross-border movement of judgments in the US. It not only leaves much room for American courts to deny recognition of a foreign judgment for the protection of the interests of its citizens, but also makes it impossible for creditors to predict the fate of a judgment at an earlier stage where they should have had a better strategy to enforce their rights.

253 *Beals v Saldanha* [2003] 3 SCR 416 (Supreme Court of Canada).
254 Kenny (2014) p.200.
255 Whytock (2015) p.118.
256 Section 4 (c) (7) 2005 Act.
257 Section 5 (b) 1962 Act and Section 5 (b) 2005 Act
258 Section 4 (6) 1962 Act and Section 4(6) 2005 Act.

Part II
Recognition of the Preclusive Effects of Foreign Judgments

3 Prevailing Approaches and Applicable Law

3.1 Introduction

With the development of international business and commerce and the frequent movement of people, the need for legal certainty in the international context has increased. This not only means that the parties are entitled to seek enforcement of a judgment in a different country but also that where a judgment has been delivered, it should have preclusive effect across borders in order to prevent endless litigation and conflicting judgments.

A rule embedded in the doctrine of *res judicata* is that a final judgment precludes repeated litigation based on the same cause of action between the same parties, also known as claim preclusion.[259] When incorporated into national law, this rule may manifest itself in different ways. In common law countries, a final and valid judgment is deemed to "merge"[260] the underlying cause of action so that no legal basis remains for either of the parties to re-litigate.[261] By contrast, in civil law countries, although a final and valid judgment is deemed not to extinguish the underlying cause of action, nevertheless a party may be considered as not having sufficient interest in a cause of action after he has obtained a favourable judgment on it, and thus be precluded from re-litigation,[262] or the court may consider that a cause of action which has previously been decided is inadmissible in new proceedings.[263]

The second prong of the doctrine of *res judicata* concerns the issue preclusion effect of judgments.[264] Issue preclusion means that certain issues that have been adjudicated in a previous judgment can bar subsequent re-litigation of the same issues.[265] Unlike claim preclusion, issue preclusion does not require the second proceedings to have the same

259 Zeuner and Koch (2012) p.11-15. The claim preclusion effect of foreign judgments will be discussed in detail in Chapter 4.

260 The common law countries prefer to use the merger theory to explain why after a final judgment has been rendered, no more litigations can be proceeded on, based on the same cause of action. The reason lies in the original cause of action is deemed to be merged by the previous judgment. See in Shapiro (2001) ff.32; Handley (2019) ff.267.

261 Handley (2019) p.267-269.

262 Van de Velden (2014) p.70.

263 British Institute of International and Comparative Law, 'The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, *Res judicata* and Abuse of Process: Germany' (2008) 24.

264 Zeuner and Koch (2012) p.16-17. The issue preclusion effect of foreign judgments will be discussed in detail in Chapter 5.

265 Ibid.

cause of action as the first proceedings. The rule on issue preclusion is widely recognized among common law countries. By contrast, in civil law countries the issue preclusion effect of judgments is less known.[266]

Both the claim preclusion effect and the issue preclusion effect have developed in relation to domestic judgments. However, the values of this doctrine are also vital to the international community. In the international arena, public interest demands that lawsuits should have an end. The same applies to private interests; for parties it would be unbearable if litigation on the same subject matter would never cease.[267]

Since the doctrine of *res judicata* was not designed for foreign judgments, the preclusive effect of foreign judgments requires a justification. In this connection, different jurisdictions adopt different approaches. The approach chosen has implications for the subsequent practice of the courts.

3.2 Brussels Ibis

3.2.1 A technical interpretation of the concept of recognition

Before the coming into force of the Brussels Convention 1968, the recognition of foreign judgments among the European countries mostly relied on national laws or bilateral treaties. At that time, sporadic practice has shown that the court addressed may recognize the preclusive effect of foreign judgments regardless of their enforceability. For example, even though a Dutch court felt reluctant to enforce a foreign judgment, the court may recognize the effect of the foreign judgment and regard the opponent as having no standing to challenge the foreign judgment in order to give protection to the successful litigant from the harassment or evasive tactics of his previously unsuccessful opponent,[268] especially where that party had availed itself of foreign process or acquiesced therein. The practice of the Dutch court is not based on any specific rules but rather on a fundamental sense of fairness and justice of the judges.

The Brussels Convention was adopted to facilitate the enforcement of foreign judgments between courts of the member states of the European Community. At first sight, the purpose of recognition of foreign judgments is to pave the way for their cross-border

266 It is reported that in Germany, France, Sweden, the law provides basically for no or only quite limited issue preclusion effect of judgments. By contrast, the Netherlands, another continental legal system, embraces the issue preclusion effect, see in Jacob van de Velden and Justine Stefanelli, British Institute of International and Comparative Law, 'The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, *Res judicata* and Abuse of Process: Comparative Report' (2008) 27.

267 Zeuner and Koch (2012) p.4 and 11.

268 Kollewijn (1960) p.34-38, cited in Von Mehren and Trautman (1968) p.1602.

enforcement. However, the intention of the drafters went beyond that. As explained in the Jenard Report,[269] recognition confers on foreign judgments "the authority and effectiveness accorded to them in the State in which they were given".[270] The Schlosser Report[271] later confirmed that the effect of foreign judgments could be recognized. Both explanatory reports support that the process of recognition not only serves to verify the foreign judgment for enforcement purposes, but also to transfer the effect contained in the foreign judgment.

After the ECJ formally confirmed the opinion of the Jenard Report in *Hoffmann v Krieg*,[272] it has rarely been doubted that the effect of a foreign judgment in its country of origin can be transferred through the mechanism of recognition. This includes the effect that arises from the *res judicata* doctrine in the court of origin.[273] In this way, if a foreign judgment is accorded a certain preclusive effect in the country of origin, such an effect can be recognized in other EU member states as well, if necessary.

With the confirmation of the meaning of recognition, the legal basis for recognizing the preclusive effect of foreign judgments is established. Although some member states, such as Sweden,[274] may still be unfamiliar with the preclusive effect of foreign judgments, most member states accept the interpretation of the concept of recognition and the principle of *Hoffmann v Krieg*[275] as the legal basis for the preclusive effect of foreign judgments.[276] Moreover, as has been suggested, this interpretation is a rule of choice of law,[277] which guides the courts to choose the law of the court of origin to determine the preclusive effect of foreign judgments.[278]

269 Jenard Report C 59/43.
270 Ibid.
271 Schlosser Report C 59/127-28.
272 (Case-145/86) [1988] ECR 645.
273 Wautelet (2016) p.814; Layton and Mercer (2004) para.24.006-007.
274 Heuman, Olsson and Pauli (2008) p.45.
275 (Case-145/86) [1988] ECR 645.
276 Van De Velden (2008) p.88; Heize (2008) p.53; Jeuland (2008) p.39.
277 In: Dickinson (2007), it is claimed that "rules concerning the recognition of judgments are, to a greater or lesser degree, in the nature of rules of applicable law. Thus, the courts of the recognising country must apply certain criteria to determine whether, and (if so) to what extent, they are prepared to recognise within their own legal system the legal effects (dispositive or procedural) of a foreign judgment".
278 This line of thinking is leading in European instruments on judicial cooperation. As reflected in Article 20 Insolvency Regulation No.2015/848, the effect of recognition means, "the judgment opening the proceedings … produce the same effect in any other Member States as under this law of the State of the opening of proceeding … ".

3.2.2 Problems of applicable law

EU member states have widely accepted the above views.[279] For example, in Germany, it is reported[280] that the claim preclusion effect of foreign judgments flows from the court of origin, provided that those judgments are recognized under Brussels Ibis. In *NV IDAT v B.J.G.*,[281] the Dutch Supreme Court held that,

> "the scope of the preclusive effect of this decision [a Belgian judgment] and the legal consequence thereof, are not determined by the law of the country of recognition, but by the law of the country where the decision was rendered…"[282]

However, there are still views that the concept of recognition is not merely giving weight to the law of the court of origin. As "the same type of judgment may be of varying scope and effect in different countries",[283] if the law of the court of origin gives more effect than the law of the court addressed, the sole application of the law of the court of origin can be problematic.[284] In this connection, the Advocate General Darmon has suggested that,[285] "a dual limit should be imposed" on foreign judgments. One of the reasons for this is that a foreign judgment "cannot have greater effect in the State in which enforcement is sought than it would have in the State in which it was delivered nor can it produce greater effect than similar local judgments would have".[286] Also in a publication of ECJ Justice Schockweiler, it is stated that the essential point in *Hoffmann v Krieg* is that "the foreign judgment cannot have more effect than national judgments of the same type".[287] Moreover, there is a view that automatic recognition under the Brussels Regime does not exclude the law of the court addressed, e.g. the law of the court addressed is involved in deciding whether a foreign judgment is irreconcilable with another judgment.[288]

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279 Jacob van de Velden (2008) p.68.

280 British Institute of International and Comparative Law, 'the Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, *Res judicata* and Abuse of Process: Germany' (2008) 53.

281 Hoge Raad 12 March 2004, ECLI:NL:HR:2004:AO1332, NJ 2004, 284 with comment from P Vlas. The case translation can be found in Jacob van de Velden (2008) p.90.

282 Ibid. According to Dutch law, the Hoge Raad has no power to review lower courts decisions on the interpretation of foreign law. Therefore, whether the Hof's-Hertogenbosch has given an accurate understanding in respect of the scope of preclusive effects of the Belgian judgment was not decided by the Hoge Raad.

283 Schlosser Report C 59/127-28.

284 Layton and Mercer (2004) para.24.010.

285 Opinion of Advocate General Darmon in case *Hoffmann v Krieg* (Case 145/86), delivered on 9 July 1987.

286 Ibid.

287 Schockweiler (1996) p.391, English translation can be found in Linke (1992) p.178.

288 *National Navigation Co v Endesa Generacion SA* [2010] 1 Lloyd's Rep 193 (CA) " … *Hoffmann v Krieg* … the question was simply whether it could be enforced despite an inconsistent decision of the national court which was not itself recognized and did not qualify for automatic recognition in the Member State where that order had been made. There was no discussion of the effect of recognition as giving rise to estoppel by

Notably, in respect of the difficulty arising from the differences of national laws, the Schlosser Report left it to be resolved by the national courts,[289] and this approach was followed by the ECJ. In *Italian Leather SpA v WECO Polstermöbel GmbH &Co*,[290] a party sought enforcement of an Italian court order in a German court. However, enforcement of the order in Germany had a more powerful effect than was envisaged under Italian law.[291] The Italian court referred the question of how to determine the effect of an enforcement order where the order does not have identical effect in two member states under their national laws.[292] The ECJ did not answer this question and left it open.[293] However, things have changed with the entry into force of Brussels Ibis. Brussels Ibis has fixed the problem perfectly in Article 54(1), where it is provided:

> "if a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effect attached to it and which pursues similar aims and interests. Such adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin".[294]

Based on the above, it can be inferred that, when determining the preclusive effect of foreign judgments, the law of the court of origin plays a dominant role. At the same time,

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record, which is the question that we have to decide, and the judgment does not contain any clear indication of how that question should be decided … " On the basis of this, the court did not examine what effect the judgment should have accorded by Spanish law, instead, directly used English law to reach the conclusion.

289 Schlosser Report C59/127-28, the Working Party did not consider it to be its task to find a general solution to the problems arising from these differences in the national legal systems.

290 (Case C-80/00) [2002] ECR I–4995.

291 Ibid.

292 The questions referred to the ECJ were: "may and must the court of the State of enforcement which has declared a foreign judgment requiring the party against whom enforcement is sought to desist from certain activities to be enforceable in accordance with the first paragraph of Article 34 and the first paragraph of Article 31 of the Convention at the same time order the measures necessary, under the law of the State of enforcement, for enforcement of a restraining order? If the answer to Question 2 is in the affirmative, must the measures necessary, under the law of the State of enforcement, for enforcement of the restraining order be ordered even if the judgment to be recognized does not itself include comparable measures in accordance with the law of the State of origin, and that law makes no provision at all for the immediate enforceability of such restraining orders?"

293 The issue was referred to the ECJ but it did not give an answer to the question since the foreign judgment at issue could not be recognized according to the conditions established by Brussels I, therefore the issue did not arise.

294 In Recital 28, it states that "where a judgment contains a measure or order which is not known in the law of the Member State addressed, that measure or order, including any right indicated therein, should, to the extent possible, be adapted to one which, under the law of that Member State, has equivalent effect attached to it and pursues similar aims. How, and by whom, the adaptation is to be carried out should be determined by each Member State".

the law of the court addressed will also be employed to guarantee that foreign judgments are given an "equivalent effect". If the law of the court of origin gives a lesser preclusive effect than the law of the court addressed, the court addressed cannot give more effect, but must give an equivalent effect to such judgment. And if the law of the court of origin gives a greater preclusive effect than the law of the court addressed, Brussels Ibis does not provide how the court addressed should react.

3.3 English law

3.3.1 A unilateral approach

Although English courts are restrictive as to the scope of foreign judgments that can be recognized, they are more generous in granting preclusive effect to foreign judgments. English law adopts a unilateral approach to the preclusive effect of foreign judgments. Under the common law, the rule is that if a foreign judgment satisfies all requirements for recognition, it can be treated in the same way as a domestic judgment, either for enforcement or in being conclusive between the parties. In particular, a foreign judgment could prevent a party from asserting or denying against the other party before an English court, the existence of a cause of action, the nonexistence or existence of which has been determined by the foreign court. A foreign judgment could also prevent a matter from being re-litigated in England.[295]

The unilateral approach under English law is further demonstrated by the fact that in Statute Law recognition of the preclusive effect of foreign judgments is directly prescribed. In Section 8(1) 1933 Act, which provides that a foreign judgment

> "shall be recognized in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in any such proceedings".

Similarly, Section 34 1982 Act provides that,

> "no proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country,

295 Dicey, Morris and Collins (2016) para.14-030.

> unless that judgment is not enforceable or entitled to recognition in England and Wales…."

Regarding recognition of the issue preclusion of foreign judgments,[296] Section 8 (3) 1933 Act provides that,

> "Nothing in this section shall be taken to prevent any court in the United Kingdom recognising any judgment as conclusive of any matter of law or fact decided therein if that judgment would have been so recognised before the passing of this Act."

3.3.2 Preference for the lex fori

Because of this unilateral approach, English courts will normally apply the law of the court addressed (the *lex fori*) and hence the *res judicata* doctrine under English law, to determine the preclusive effect of foreign judgments. Since *Godard v Gray*,[297] English courts have shown a preference for the *lex fori* in determining the preclusive effects of foreign judgments.[298] Judge Blackburn held that,

> "it is quite clear this [i.e. to try the cause over again in a court, not sitting as a court of appeal from that which gave the judgment] could not be done where the action is brought on the judgment of an English tribunal; and, on principle, it seems the same rule should apply, where it is brought on that of a foreign tribunal."[299]

In line with the above, it was held that the preclusive effect of judgments (both cause of action estoppel and issue estoppel) is of a procedural nature and thus governed by the *lex fori*,[300] and that (for evidence purposes) foreign law should be "presumed to be the same as English law".[301] Since the criteria for recognition of foreign judgments under English

296 *Black-Clawson International Ltd v Papierwerke AG* [1975] AC 591.
297 (1870-71) LR 6 QB 139 (1870) (QB).
298 Ibid.
299 Ibid. 150.
300 In: *Repubic of India v India Steamship Co Ltd; The Indian Endurance and The Indian Grace* [1993] AC 410 (HL), Lord Goff of Chieveley stated that "the principle of estoppel *per rem judicatam* is not more than a rule of evidence", see in Barnett (2001) p.49, see also in Van de Velden (2014) p.329 and Van de Velden (2012) p.525.
301 *Repubic of India v India Steamship Co Ltd; The Indian Endurance and The Indian Grace* [1993] AC 410 (HL).

common law or Statute Law can "verify the *res judicata* status of a judgment",[302] "there would be no incentive in the court addressed to engage in choice of law considerations".[303] The insistence on the unilateral approach can also be shown by the view on the recognition of foreign judgments under Brussels Ibis before the Brexit. Despite the widely-accepted principle established by *Hoffmann v Krieg*,[304] upon the background of the Brussels Ibis, it has been suggested that, the court addressed should be capable of applying its own law, since recognition has incorporated the foreign judgment into the legal order of the member state in which the recognition is sought.[305]

Nonetheless, it has been held that a reference to foreign law is necessary, even if this might prove difficult. In *Carl Zeiss* case,[306] Lord Reid held that:

> "…estoppel is a matter for the lex fori but the lex fori ought to be developed in a manner consistent with good sense", and "it seems…to verge on absurdity that we should regard as conclusive something in a German judgment which the German courts themselves would not regard as conclusive."[307]

In *Yukos Capital Sarl v OJSC Rosneft Oil Co*,[308] the English court followed the above considerations and confirmed that a good sense of foreign law is needed.[309] From the case law, it can be found that English courts have no obligation *ex officio* to refer to foreign laws.[310] Therefore, the consideration of foreign law mostly depends on the pleadings of the parties, the evidence presented and the court's discretion.[311] If parties fail to plead a different rule in foreign law, English courts may presume that foreign law and English law are the same. Therefore, even though English courts may refer to the *lex fori* to decide the preclusive effect of foreign judgments, it essentially results from a failure of the parties to

302 Barnett (2001) p.38-39.

303 Barnett (2001) p.38-39. It is further contended that, " … foreign judgments recognised according to the common law and related statutory schemes are accorded *res judicata* status by reference to the *res judicata* criteria known to the English common law and without any particular regard to the criteria that might obtain in the foreign judgment rendering court."

304 (Case-145/86) [1988] ECR 645.

305 Briggs (2013) (2) p.145.

306 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 (HL).

307 Ibid. 919.

308 [2011] 2 Lloyd's Rep 443 (QB).

309 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853, 919. In this case, Dutch procedural law was considered by the English court before giving effect to the decided issue; see also Van de Velden (2012) p.525-526.

310 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 (HL); *The Sennar* [1985] 1 Lloyd's Rep 521(HL); *Naraji v Shelbourne* [2011] EWHC 3298 (QB).

311 It has also been observed that the difficulty in pleading foreign law might also be caused by the unfamiliarity with foreign procedure and foreign law of English courts, see in Jacob van de Velden (2014), 329.

prove the relevant foreign law. This was observed in *Carl Zeiss (No.2)*,[312] where Lord Reid stated that,

> "we should have to be satisfied that the issues in question cannot be relitigated in the foreign country. In other words, it would have to be proved in this case that the courts of the German Federal Republic would not allow the re-opening in any new case between the same parties of the issues decided by the Supreme Court in 1960, which are now said to found an estoppel here ... "[313]

3.4 The US law

3.4.1 Two parallel approaches

In the United States, there is a policy-based approach which explains the recognition of foreign judgments and the extent to which the effect of foreign judgments should be respected. It was suggested that the doctrine of *res judicata* is the real basis for the recognition of foreign judgments, since public policy dictates that there must be an end to litigation and those who have contested an issue will be bound by the result of this contest and that matters once tried will be considered forever settled as between the parties.[314] Following this theory, foreign judgments can have preclusive effects before American courts. It has been observed that, if by giving effect to foreign judgments a domestic policy of *res judicata* is promoted, there are no grounds to refer to foreign law to determine the actual effect of such judgments.[315]

On the other hand, it should be noted that, the practice within the federation of states, especially the practice in the inter-state setting greatly influences the treatment of foreign judgments. For example, during the early years of the 20th century, some state laws directly equated the effect of foreign judgments with that of this state's own judgments and sister-state judgments.[316] This tradition still has implications for current practice in the United States. The Full Faith and Credit Clause[317] in the United States Constitution and its implementing statute[318] requires that a state judgment should be given same faith and credit as it had by the law and usage in the court of origin. Although they do not apply to

312 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 (HL).
313 Ibid. 919.
314 Reese (1950) p.784.
315 Smit (1962) p.63.
316 Cal Civ Proc Code § 1915. On the background of this provision see Lorenzen (1919) p.204-205.
317 U S Constitution Art. IV §1. See Chapter 2 Section 2.2.3.
318 28 U S C §1738.

foreign judgments, it is accepted as a rule under the common law that a foreign judgment is generally entitled to recognition by courts in the United States to the same extent as a judgment of a court of a (sister-) state in the court of another state.[319] It follows that a foreign judgment could have the same preclusive effect in the American courts as accorded to it by its court of origin. This second approach is endorsed by the latest Restatement (Fourth) of Foreign Relations of Law.[320]

3.4.2 Applicable law

3.4.2.1 Foreign law or local law?

The two alternative approaches that justify the preclusive effect of foreign judgments lead American practice to a confused situation in terms of the applicable law. On the one hand, the policy-oriented approach implies the application of local laws by the court addressed to determine the preclusive effect of foreign judgments. On the other hand, it requires courts to give preclusive effect to foreign judgments in the same way as to sister-state judgments, and thus endows the law of the foreign court of origin to determine the preclusive effect of its judgment.[321]

The policy-oriented approach has been confirmed by courts and in academia. In the *Alfadda v Fenn* case,[322] the court whilst emphasizing the significance of policy considerations, held that the use of the US law is necessary, and a foreign judgment may even have greater preclusive effect in an American court than in the court of origin. It was held that,

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319 In: *Truscon Steel Co v Biegler* 28 N E 2d 623 (1940), the court held that "by the rule of comity the same force and effect is given to a judgment of a foreign country as is given to a judgment of a sister state.". In: *Julen v Larson* 25 Cal App 3d 325 (1972) it was held that, "to be recognized and enforced in the same manner as the judgment of a sister state entitled to full faith and credit, a foreign money judgment must be conclusive". In: *Manor v Manor* 811 S W 2d 497 (1991) It was held that, " doctrine of comity authorizes state and federal courts to give recognition and force and effect to judgments obtained in foreign countries to the same extent as in case of judgments of sister states"; In: *S B v W A* 959 N Y S 2d 802 (2012) it was held that, "although not required to do so, courts of New York generally will accord recognition to judgments rendered in foreign country under doctrine of comity which is equivalent to full faith and credit given by courts to judgments of sister states". See also Peterson (1972) ff.220; Casad (1984-1985) p.56; § 481 Comment c, Restatement (Third) of Foreign Relations Law (1987); § 487 Restatement (Fourth) of Foreign Relations Law (2018): "a foreign judgment entitled to recognition under § 481 is given the same preclusive effect by a court in the United States as the judgment of a sister State entitled to full faith and credit".

320 § 487 Restatement (Fourth) of Foreign Relations Law (2018).

321 § 487 Restatement (Fourth) of Foreign Relations Law (2018), it is stated that a foreign judgment will not be given greater preclusive effect in the United States than the judgment would be accorded in the state of origin, see also in Casad (1984).

322 966 F Supp 1317 (S D N Y 1997).

> "the United States policy considerations may differ from those of the foreign country, or more likely, the methods by which the foreign country achieves similar policy objectives may differ…. Regardless of the mechanisms utilized by a foreign court to achieve its objectives, a United States court should not be confined to using the foreign court's mechanisms or else forgo achieving its own objectives."[323]

Furthermore, it has been held that, if a foreign court uses a different legal mechanism to prevent re-litigation and conflicting judgments, American courts may always use their own laws to achieve the same objective.[324] More justifications for this first approach can be found in scholars' views. It has been observed that to recognize the preclusive effect of foreign judgments should only be based on the US law, as such determination should only be based on the interests and values of American courts and litigants rather than the attitudes of a foreign court.[325] It has also been suggested that it is easier for parties to use the US law rather than to refer to foreign law to determine the effect of foreign judgments, and if a foreign law should be applied, parties and courts have to bear a heavier burden in order to prove and construe foreign law.[326]

On the other hand, there are plenty of cases in which American courts have adopted the second approach.[327] And the application of foreign law to determine the preclusive effect of foreign judgments also receives support in academia. It has been suggested that, where foreign preclusion law is wider than the US law, the grounds for non-recognition of foreign judgments could be an effective shield against gross unfairness arising from those judgments.[328] Furthermore, it was suggested that, as in most cases foreign preclusion law is narrower than the US law, there exists less difficulty in discovering its narrow content.[329] Moreover, it was viewed that respecting of foreign law is necessary in a world of ever-increasing globalization, in which the United States intends to earn more respect from other countries.[330]

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323 Ibid.

324 Ibid.

325 Vestal (1966) p.873

326 Cheatham and Reese (1952) p.976; see also in Smit (1962) p.63.

327 *Palmarito De Cauto Sugar Co v Warner* 232 N Y S 569 (1929) The Cuban decree in insolvency which it is sought to use as a bar to this action … The Cuban Codes of Commerce and of Civil Procedure, on critical reading … which were wholly ignored in the process of procuring the judgment set up as res adjudicata here; *Watts v Swiss Bank Corp* 27 N Y 2d 270 (1970) New York courts would normally apply foreign country's claim preclusion rules.

328 For example, if giving effect to issues not actually litigated is contrary to the public policy of the recognizing American state, it is claimed that the ground for non-recognition can be invoked, see Casad (1984) p.72.

329 Casad (1984) p.72.

330 Clermont (2016) p.97.

Given all the above considerations, the Proposed Federal Statutes on the Foreign Judgments Recognition and Enforcement Act have adopted a hybrid approach. On the one hand it confirms the general position that the US courts will give the same effect to a foreign judgment as they have in the court of origin.[331] On the other hand, it introduces several factors that should be considered before applying foreign law. These factors are: (i) whether it is justified – given the context or the amount at stake – to give greater or lesser preclusive effect than under the law of the state of origin; (ii) whether substantial differences in procedural possibilities in the state of origin justify a departure from the preclusion rule of that state; (iii) whether the United States or a state of the United States where preclusion is raised has a strong interest in adjudicating or not adjudicating the claim or issue; (iv) whether the law applied by the state of origin is significantly different from the law to be applied in the proceedings in the United States.[332]

3.4.2.2 Federal law or state law?

Even if foreign law may be referred to, in order to determine the preclusive effect of foreign judgments, the US law still plays an important role. Where the US law applies, this raises another question: how to choose between federal law and state law?

Where a foreign judgment is invoked before a state court, there is no great difficulty in applying the state's preclusion law to determine the effect of the judgment. However, where the case is before a federal court, the applicable law to determine the preclusive effect of foreign judgments is more controversial.

Even in the federation, the issue of how to choose between federal law and state law to determine the preclusive effect of judgments is open to debate. Court practice within the federation has demonstrated that in some cases, federal courts tend to give a broader preclusive effect for the sake of the federal interests than state courts.[333] Notably, since the 1930s, more and more distinctions have appeared between federal and state procedural law. Federal courts encourage parties to dispose of the whole controversy once and for all for the sake of judicial economy. In *Haring v Prosise*,[334] even though in theory, the Full Faith and Credit clause requires federal courts to respect the preclusive effect according

331 §4, American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006). The general rule is that the law of the court of origin has priority to determine the preclusive effect of foreign judgments.

332 § 4 Comment b, ALI Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006).

333 Vestal (1968) ff.1739.

334 462 U S 306 (1983), see also in Shreve (1986) p.1226. The author proposed that "federal courts should not be confined to state preclusion law when it is so undeveloped or confused that it does not suggest an answer. In addition, federal courts should be free to give greater effect to a state judgment than the rendering court would give, when doing so would not frustrate the purpose behind the state's rule of lesser preclusion and would advance the purpose behind the federal forum's rule of greater preclusion."

to the law of the court of origin, the Supreme Court held that this principle does not require federal courts to apply only state law. Federal courts could step in where state courts were unable or unwilling to protect federal rights and give greater preclusive effect to a state judgment.

When the case moves from the federal and inter-state courts to the international arena, in *Alfadda v Fenn*,[335] the court held that federal courts should apply either federal or state law depending on the nature of the claim to determine the preclusive effect of a foreign country judgment.[336] This means that where the substance of the case concerns a federal law claim, such as a maritime claim, federal law should be applied to decide the preclusive effect of the foreign judgment. However, an alternative approach suggests that insofar as a foreign judgment is invoked before a federal court, federal law should always prevail.[337] The reason is that, the preclusive effect of foreign judgments is a matter of procedure, and therefore federal courts only need to apply federal law which is subject to congressional action and regulation and to the practice of the higher federal courts.[338]

3.5 Concluding remarks

In the selected jurisdictions, there are different theoretical bases and prevailing approaches in dealing with the preclusive effect of foreign judgments. Under Brussels Ibis, the interpretation of the concept of recognition implies that the recognition not only paves the way for the enforcement purposes but also transfers the effect of foreign judgments from the court of origin to the court addressed, which includes the preclusive effect of foreign judgments. English law takes a unilateral approach based on its own standards as to the preclusive effect of judgments. Its logic is that if a foreign judgment can be recognized, it is treated in the same way as domestic judgments concerning its preclusive effect before English courts. Under the US law, two alternative approaches prevail. The one based upon the analogous treatment of sister-state judgments within the United States, the other based on a public-policy-oriented analysis.

The different approaches lead to different outcomes with regard to the applicable law. Under Brussels Ibis, the interpretation of the concept of recognition implies that the law of the court of origin determines the preclusive effect of foreign judgments. Moreover, according to case law and other related provisions, the law of the court addressed may also play a role, since the preclusive effect of judgments can be different from country to country. The unilateral approach taken under English law makes it clear that English law as the law

335 966 F Supp 1317 (S D N Y 1997).
336 Ibid.
337 Brummett (1988) ff.83.
338 *Hanna v Plumer* 380 US 460, 465 (1965); *Kellman v Stoltz* 1 FRD 726, 727 (1941).

of the court addressed is decisive to determine the preclusive effect of foreign judgments. Nonetheless, case law shows that English courts will also consider foreign law. Under the US law, due to the existence of two parallel approaches, the law of the court of origin and the law of the court addressed are equally important. If the foreign judgment is raised before a federal court, the court may need to consider how to choose between federal law and state law.

By comparison, the prevailing approach under Brussels Ibis and the US law seem more balanced than that under English law. Both recognize that foreign law is appropriate to determine the preclusive effect of foreign judgments. At the same time, the law of the court addressed is not ignored. Nonetheless, there are still differences between the two. Under Brussels Ibis, the application of foreign laws is an obligation of the member states whereas the application of local laws is only supplementary in order to guarantee that foreign judgments will not have greater effect in the court addressed than in the court of origin. Under the US law in contrast, the local law can be the only source to determine the preclusive effect of foreign judgments, for the sake of the policy considerations.

The English unilateral approach straightforwardly gives more weight to its own domestic law. This simplifies the process of determining the applicable law compared to Brussels Ibis and the US law. Moreover, the fact that English court grants such an effect solely upon the standards of English law is justified for foreign judgments tend to be given more preclusive effect than other jurisdictions. However as English case law reflects an increasing awareness of the need to apply foreign laws, it seems that convergence is occurring between all the three legal systems.

4 Recognition of Foreign Judgments and Claim Preclusion Effects

4.1 Introduction

From Chapter 3, it is clear that the selected jurisdictions have diverging leading approaches to recognizing the preclusive effect of foreign judgments. In the following two chapters, based on court practice, it will be assessed whether and how these leading approaches are applied to recognize the different types of preclusive effect of foreign judgments. In this chapter, the focus is on the claim preclusion effect of foreign judgments.

In the domestic context, claim preclusion means that a final and valid judgment can preclude re-litigation on the same cause of action and between the same parties. On the international plane, in principle each country decides for itself on which basis to establish their jurisdiction rules and that there is internationally much divergence at this point. Therefore, proceedings on the same case are inevitable and may take place in different countries. After a judgment has been rendered by a court, parties may initiate a new action based on the same case for different purposes: It may be raised by a party who was defeated in the previous proceedings, in order to obtain a more favourable result. Also, a new action may be brought by the party in whose favour the previous judgment was decided in order to obtain additional satisfaction. Finally, re-litigation may be sought for enforcement purposes. A judgment creditor may start a new action on the original cause of action to enforce his claim, since it may be easier for him to do so than to seek the recognition and enforcement of the judgment. If in theory a foreign judgment is supposed to have claim preclusion effect in the court addressed, to what extent and in which way can problems of re-litigation be fixed by such an effect in practice?

4.2 Brussels Ibis

According to the Jenard Report[339] and the holding of *Hoffmann v Krieg*,[340] the preclusive effect of foreign judgments within Brussels Ibis takes place through "recognition", more specifically, through conferring on foreign judgments the "authority and effectiveness"

339 Jenard Report C 59/43. See above Chapter 3 Section 3.2.
340 (Case-145/86) [1988] ECR 645.

accorded to them in their country of origin. It can be expected that national courts of the member states would also give some claim preclusion effect to foreign judgments by referring to the law of the court of origin, as the concept of recognition of judgments already implies that the law of the court of origin determines the legal effects of a decision.[341]

Despite the above, based on the practice it can be found that Brussels Ibis itself can resolve possible re-litigation issues. This implies that Brussels Ibis grants judgments from courts in EU member states certain autonomous claim preclusion effects, which can be used to preclude repetitive suits. In this process, there is no need to even refer to the law of the court of origin or the law of the court addressed.

4.2.1 Precluding re-litigation for contradictory results

The objective of Brussels Ibis arguably provides strong support for the autonomous effect of precluding re-litigation for contradictory results. In order to achieve the mutual recognition and enforcement of foreign judgments which is required for achieving the higher objective of "the harmonious administration of justice", irreconcilable judgments should be avoided as much as possible between EU member states.[342]

Given this, Recital 21 in its preamble provides:

> "in the interests of the harmonious administration of justice it is necessary to minimize the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States…"

In avoiding the scenario of irreconcilable judgments, Brussels Ibis employs the rule of *lis pendens* in Article 29.[343] Where a court finds that earlier proceedings have been initiated in a foreign court on the same cause of action and between the same parties as those of an action before it, the court shall stay or dismiss the action. The formula of the *lis pendens* rule is quite similar to the doctrine of *res judicata* and indicate that a judgment from a member state can preclude a proceeding in another court between the same parties and on the same cause of action to avoid irreconcilable situation. Given this, it was held that,

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341 The examination of the claim preclusion effect of foreign judgments based on national laws of the member states is not the focus of this research, due to the language limits of the author. Instead, the author will put more focus on the autonomous preclusion effect deriving from the Brussels Ibis Regulation itself.

342 Recital 21 Brussel Ibis. In the Jenard Report C 59/41, it is also stated that competing judgments, which would hamper the free and easy movement of judgments, should be avoided.

343 It provides that, "without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established."

> "recognition as I see it must mean recognition as having conclusive effect. Furthermore, where under Article 21 the proceedings are between the same parties and involve the same cause of action and the same subject matter, a judgment must in my judgment be binding under Order 26 between all those parties".[344]

Similarly, it has been suggested that,

> "there appears to be no room for doubting that a Member/Contracting State judgment may have the effect of preventing the parties to the original proceedings, and certain other persons, from re-litigating claims already determined."[345]

Even though the objectives of Brussels Ibis and the *lis pendens* rule support the existence of autonomous claim preclusion effects under Brussels Ibis, it becomes less persuasive when considering Article 45(1) (c) Brussels Ibis. Here it is provided that, regardless of whether the local court's judgment is of earlier or later date than the foreign judgment, insofar as the foreign judgment is inconsistent with the local court judgment, the court will refuse the foreign judgment. It seems still possible that, the proceeding before the second court (the court addressed) would not be affected even if a foreign judgment has been rendered ahead, especially where the second court considers the foreign judgment to be irreconcilable with its own judgment. In this connection, it has been observed that Article 45(1) (c) Brussels Ibis normally concerns situations where the second court is ignorant of the earlier foreign proceedings and where the parties have not raised the issue of the possible conflicting judgments.[346] Given this, in cases where a judgment has already been rendered in a member state, and a party immediately and intentionally institutes a new action in the court addressed to seeking a contradictory result, it is not appropriate to apply Article 45(1)(c) to defeat the claim preclusion effect of the prior judgment. In contrast, in cases where a judgment has already been rendered in a member state, but the second court seizes the case again and unintentionally ignorant of the prior judgment,[347]

344 *Berkeley Administration Inc v McClelland*[1990] 2 QB 407 (CA). A similar idea has been expressed by Oberhammer (2002) p.431, see Oberhammer and Hoffmann-Nowotny (2008) p.45.

345 Jacob van de Velden (2008) p.60.

346 Francq (2016) p.919.

347 For example, according to Article 29 (2) Brussels Ibis, a court only needs to inform other courts of the date when it seized the case upon the request of the latter. This means that, even if the existence of the *lis pendens* rule, courts of the member states are still very likely to seize the same case currently due to the lack of information.

Article 45 (1)(c) may limit the autonomous claim preclusion effect of foreign judgments under Brussels Ibis. It is submitted that, to fully guarantee the autonomous claim preclusive effect of foreign judgments, it may be sensible to adopt a procedural disclosure duty for the parties in the subsequent court proceedings to inform the court about the fact that a foreign court has already given a judgment on the same cause of action and between the same parties or that proceedings are pending already before a foreign court on the penalty that the second judgment – even if from a local court – does not prevail over the earlier decision from the foreign court. The proposed disclosure duty could take the form of an exception to the rule of Article 45 (1)(c) Brussels Ibis based on the fact that the non-disclosure to the later seized court amounts effectively to a misleading of the later seized court.

4.2.2 Precluding re-litigation for enforcement

In *De Wolf*,[348] the judgment creditor intended to institute a new proceeding on the original claim against the judgment debtor as an alternative way to enforce his claim. The judgment creditor argued that it would give insufficient protection to judgment creditors if they were deprived of the right to institute a new action. However, the ECJ held that the court of a member state should not allow the institution of a new action even for enforcement purposes. It is incompatible with the meaning of "recognition" if a court of a member state allows a new proceeding on the same cause of action and between the same parties when a court in another member state has already delivered a judgment.[349]

Given this, it has been suggested that, the claim preclusion effect of foreign judgments under Brussels Ibis means that, after a foreign judgment has been rendered, the underlying cause of action is merged and that the judgment creditor will have no base to re-litigate in any rate.[350] Apparently however, this view is irreconcilable with the doctrine of the autonomous interpretation of EU law, and which implies that Brussels Ibis must be interpreted independently from (concepts drawn from) national law, such as the common law notion that the underlying cause of action is merged by a final judgment.

In fact, the significance of *De Wolf* is that it confirms the autonomous nature of the claim preclusion effect of foreign judgments as it precludes re-litigation for enforcement purposes. If re-litigation was allowed to enforce foreign judgments by national courts, this

348 *Jozef de Wolf v Harry Cox BV*(Case-42/76) [1976] ECR 1759.

349 Ibid.

350 Briggs (2008) para.9.46. Under English law, the claim preclusion effect of judgment is sustained by the merger rule, See below Chapter 4 Section 4.3.2. It means that after a judgment has been rendered the original cause of action is merged by the judgment, therefore the party has no cause of action to re-litigate the case, especially for the sake of repetitive remedy, see in Handley (2019) p.267-269.

would be detrimental to the simplified enforcement mechanism. Therefore, the ECJ held that new actions for enforcement are prohibited. However, as the ECJ did not address specifically whether re-litigation for other purposes should also be prohibited, it is dangerous to expand the meaning of the ECJ's opinion.

4.3 English law

English law takes a unilateral approach in its treatment of foreign judgments. This means that in theory, the preclusive effect of foreign judgments is determined based on English law and that a recognized foreign judgment can have the same preclusive effect as a domestic judgment.

4.3.1 Precluding re-litigation for contradictory results

Under English law, the rule of cause of action estoppel specifically deals with the effect of judgments to preclude re-litigation to achieve a contradictory result. In *Thoday v Thoday*,[351] Diplock LJ stated that judgments have two species of estoppel effect, namely, "cause of action estoppel" and "issue estoppel". Specifically, "cause of action estoppel" concerns the situation where in later proceedings between the same parties or privies, a party is barred from "asserting or denying the existence of a particular cause of action", where "the non-existence or existence of" has been decided in a previous judgment.[352] It has further been held that cause of action estoppel is an absolute bar to actions unless fraud or collusion is alleged, and that even new factual matters which could not have been discovered by exercising reasonable diligence in the earlier proceedings, will not permit re-litigation.[353]

In *Carl Zeiss*,[354] the House of Lords confirmed the unilateral approach and applied the rule of cause of action estoppel to foreign judgments.[355] This means that a previous foreign judgment can prevent a party from re-litigating on the same cause of action for seeking a contradictory result. In fact, already in *Ricardo v Garcias*,[356] the claimant whose claim failed in French proceedings intended to re-litigate before the English courts and claimed that the French proceedings were contrary to justice and were not final and conclusive. Lord Campbell held that the French judgment constituted a bar to the proceeding instituted by

351 [1964] 1 All ER 341 (CA).
352 *Thoday v Thoday* [1964] 1 All ER 341.
353 *Arnold v National Westminster Bank Plc* [1991] 2 AC 93, 104 (HL).
354 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 (HL).
355 Barnett (2001) p.94.
356 (1845) 12 CL & Fin 368 (HL), cited in *Baker v Ian McCall International Ltd* [2000] CLC 189.

the claimant, in which the cause of action and subject matters were the same as in the French proceedings.[357]

4.3.2 Precluding re-litigation for additional satisfaction

4.3.2.1 Common law

Under English law, in justifying the claim preclusion effect of judgments, there is a theory that a final judgment is deemed to extinguish the underlying causes of action and therefore a party who has had a favourable result in the previous proceeding would have no legal basis to re-litigate the case.[358] This is the so-called merger rule.[359]

However, English courts do not recognize that the merger rule applies to foreign judgments, especially under the common law.[360] This means that a party who has had a favourable result in the previous proceeding can sue on the original cause of action for a better result. In *Taylor v Hollard*,[361] it was held that a party could either bring an action to enforce the foreign judgment or institute a new action based on the original cause of action before the English court, since the underlying cause of action does not merge into the foreign judgment. Similarly, it was held in the *India Grace*[362] that,

> "… nonetheless such a judgment, in favour of the plaintiff, did not at common law constitute a bar against proceedings in England founded upon the same cause of action. This was because the principle of merger in judgment did not apply in the case of a non-English judgment."

The only exception is that if the foreign judgment has already been satisfied, the merger rule can be applied.[363] As Lynskey J held that,

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357 Ibid.

358 In: *Blair v Curran* 62 CLR 464 (1939), it was held that "the distinction between *res judicata* and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is *merged* and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order".

359 Handley (2019) ff. 267.

360 *Taylor v Hollard* [1902] 1 KB 676; *Republic of India v India Steamship Co Ltd; The Indian Endurance and the Indian Grace* [1993] AC 410.

361 [1902] 1 KB 676, 681.

362 *Republic of India v India Steamship Co Ltd; The Indian Endurance and the Indian Grace* [1993] AC 410, 417-418 (Lord Goff Chieveley).

363 *Barber v Lamb* 141 ER 1100. In: *Kohnke v Karger* [1951] 2 KB 670 (KB), Erle CJ held that "the equity that prevents double satisfaction does not rest on merger, but on the principle that the claimant has obtained the judgment so obtained has been satisfied … it would be manifestly contrary to reason and justice to

> "if a plaintiff has brought proceedings in a foreign country against a defendant for damages in respect of a cause of action and obtains a judgment, and that judgment is satisfied, it appears on the authorities that he cannot proceed in respect of the same debt or of damages based on the same cause of action against the same defendant in the courts of this country."[364]

4.3.2.2 Statutes

Even though the merger rule is held not to be applicable to foreign judgments under the common law, due to the provisions of the English statutes, English courts have to continue their discussion on this point.

On the one hand, it is considered that by Section 8(1) 1933 Act, the right of the successful plaintiff in respect of seeking additional satisfaction through re-litigation on the original cause of action has been overruled. Section 8(1) provides that a foreign judgment

> "shall be recognized in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in any such proceedings".

In *Black-Clawson*,[365] Lord Reid held that, based on Section 8(1) 1933 Act, foreign judgments on the merits are conclusive as to the matters that have been decided by foreign courts, specifically, if a successful plaintiff abroad is entitled to disregard his foreign judgment and sue here again on his original right because a right is not merged in a foreign judgment. The original defendant could plead the foreign plaintiff's judgment as a defence to prevent the plaintiff's attempt to do better for himself here.[366]

On the other hand, it has been doubted whether Section 8 1933 Act can be interpreted as stated above. Specifically, Lord Denning M.R. has suggested that section 8(1) 1933 Act only deals with the rule of "cause of action estoppel",[367] therefore, it cannot be used as the basis for precluding re-ligation for additional satisfaction.

Apart from the 1933 Act, it has been suggested[368] that Section 34 1982 Act concerns the effect of foreign judgments in barring re-litigation instituted by the party who has

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allow the successful party to endeavour to obtain a better judgment in respect of the same matter from some other tribunal".

364 *Kohnke v Karger* [1951] 2 KB 670, 675.

365 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL).

366 Ibid.

367 Under English law, cause of action estoppel means that the existence or non-existence of a cause of action decided by a prior judgment cannot be re-litigated. It was held by Lord Denning M.R. that section 8(1) 1933 Act dealt with "cause of action estoppel" and section 8(3) with "issue estoppel", see in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591.

368 Barnett (2001) p.98.

obtained a favourable judgment for seeking additional satisfaction based on the same cause of action. It provides that,

> "no proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales or, as the case may be, in Northern Ireland."[369]

Literally, if a foreign judgment is "enforceable" and regardless of whether it has been satisfied, re-litigation by the previous plaintiff should be prevented. This means that re-litigation for additional satisfaction can be prevented by invoking this provision.

However, when examining the facts of the cases concerning this provision, the conclusion that Section 34 1982 Act has confirmed the application of the merger rule to foreign judgments is still in doubt. In *Black v Yates*,[370] a claimant instituted proceedings on behalf of her dead husband in a Spanish court against the driver after the accident, in which the claimant also claimed for her own and her children's injuries. After the Spanish proceedings, the claimant's claim had been fully satisfied. The claimant then instituted before the English courts a new action for her own and her children's injuries and for damage to property. By invoking Section 34 1982 Act, the English court prevented the claimant from re-litigating damages that had been fully satisfied.[371] In *The India Grace*,[372] the court again confirmed the application of section 34 1982 Act in precluding the claimant's re-litigation for claiming part of damages not covered by the first judgment based on the same cause of action. Both cases not only met the requirement under Section 34 1982 Act, but also concerned the same situation i.e. the previous judgment has already been fulfilled. Therefore, the decisive factor in the two cases could be "the satisfaction of the previous judgment". If this is the case, it is hard to say that the statutes have made any difference from the common law.

369 Section 34 1982 Act.
370 [1991] 1 Lloyd's Rep 181 (QB).
371 Ibid.
372 *Republic of India v India Steamship Co Ltd; The Indian Endurance and the Indian Grace* [1993] AC 410 (HL).

4.3.3 *Precluding re-litigation for enforcement*

An action on the original cause of action is rarely prevented by English courts where the purpose of the action is to seek recognition and enforcement of foreign judgments under the common law.[373] However, if enforcement of foreign judgments can be based on the 1933 Act or on other regulatory frameworks, such as Brussels Ibis or the Lugano Convention, re-litigation for enforcement purposes should be rejected.[374] Section 6 1933 Act provides that,

> "no proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Part of this Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom."[375]

4.4 The US law

The above general discussion on the two prevailing approaches under the US law shows that, both local law and foreign law can be applied to determine the preclusive effect of foreign judgments. It gives rise to the question of whether the two approaches are equally applied in practice in deciding whether to sustain the claim preclusion effect of foreign judgments.

4.4.1 *Precluding re-litigation for contradictory results*

Traditionally speaking, American courts apply the rule of bar[376] to preclude a second action instituted by a plaintiff on the same cause of action for a contradictory result after a court has made a decision in favour of the opposing party, no matter whether it is a domestic judgment or a foreign judgment.

In *Burnham v Webster*,[377] it was held that judgments either foreign or domestic would bar subsequent suits between the same parties or their privies, and for the same matter

373 Section 34 1982 Act.

374 Section 6 1933 Act and *Jozef de Wolf v Harry Cox BV* (Case-42/76) [1976] ECR 1759.

375 Section 6 1933 Act.

376 Under the US law, the rule of claim preclusion is also called the rule of merger and bar. The rule of bar particularly refers to a valid and final judgment in favour of the defendant, which bars another action by the plaintiff on the same cause of action. The rule of bar is similar to the "cause of action estoppel" in English law, by which an unsuccessful plaintiff is prevented from contradicting the result of the previous judgment. See above Chapter 4 Section 4.3.1, see also in Peterson (1972) p.230.

377 *Burnham v Webster* 4 FC 781 (1846).

previously litigated and decided on by the court. It seems that the only concern of the court in applying the same rule of bar to foreign judgments is on the validity of foreign judgments. It was held that,

> "I would not allow the plaintiff abroad, who had sought it there, to avoid it, unless for accident or mistake, as here. Because in other respects, having been sought there by him voluntarily, it does not lie in his mouth to complain of it ... Nor would I in any case permit the whole merits of the judgment recovered abroad to be put in evidence as a matter of course, but being prima facie correct, the party impugning it and desiring a hearing of its merits, must show first, specifically, some objection to the judgment's reaching the merits, and tending to prove they had not been acted on. Or, by showing there was no jurisdiction in the court, or no notice, or some accident or mistake, or fraud, which prevented a full defence, and has entered into the judgment. Or, that the court either did not decide at all on the merits, or was a tribunal not acting in conformity to any set of legal principles, and was not willingly recognized by the party as suitable for adjudicating on the merits…"[378]

With American courts' increasing acceptance of foreign judgments, the concern on the validity of foreign judgments can be removed by the specific requirements for the recognition of foreign judgments or merely by the basic principles for the recognition. In view of this, the application of the rule of bar to foreign judgments has been enhanced. In *Johnston v Compagnie Generale Transatlantique*,[379] the court allowed the defendant to use a French judgment to bar re-litigation on the original cause of action, even though the requirement of reciprocity was not satisfied. In *Tamas v 20th Century Fox Film Corp*,[380] the Supreme Court of New York held that even though the judgment from the Hungarian court did not constitute *res judicata*, the principle of "comity" allowed effect to be given to the Hungarian judgment as a bar to the New York proceedings.[381] From this latter case, it can be found that American courts do not consider whether the foreign law accords the judgment with the effect of claim preclusion, which implies that American courts only used the local rules to preclude a second action for a contradictory result.

378 Ibid.
379 46 A L R 435 (1926).
380 25 N Y S 2d 899 (1941).
381 Ibid.

4.4.2 Precluding re-litigation for additional satisfaction

Under the US law, the rule of merger[382] is usually applied to preclude re-litigation in which the successful party intends to re-litigate for additional satisfaction after a domestic judgment has been rendered. However, this rule does not apply to foreign judgments. In *Wood v Gamble*,[383] it was held that a judgment obtained in Canada but not satisfied is no defence to a suit on the same cause of action.[384] In *Eastern Townships Bank v H S Beebe & Co*,[385] it was held that a foreign judgment does not merge the cause of action and the foreign judgment is of no higher nature than a cause of action.[386]

In the comment to Section 95 of the *Restatement (Second) of Conflict of Laws*,[387] it is stated that,

> "A cause of action for the recovery of money damages is merged in a valid and final judgment rendered in favour of the plaintiff in a State of the United States; the cause of action is extinguished and a new cause of action on the judgment is created. No merger results, however, in the case of a judgment for money damages rendered in a foreign nation. Following a judgment of the latter sort, a plaintiff who has not obtained complete satisfaction may maintain in the United States either an action on the original cause of action or an action to enforce the judgment …"

It follows that where a party has obtained a favourable judgment in a foreign court, he can still institute a new action on the same claim before American courts to seek additional satisfaction. However, there are exceptions. It has been held that, if a foreign judgment "has been paid or satisfied", the underlying cause of action had been merged.[388] Further,

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382 The rule of merger is where a valid and final judgment is rendered in favour of the plaintiff, he cannot thereafter maintain an action on the original claim or any part thereof. This is similar to the English merger rule, see above Chapter 4 section 4.3.2.

383 59 Am Dec 135 (1853).

384 Ibid.

385 38 Am Rep 665 (1880). It was held that, "the faith and credit accorded by one state to the judgments of other states rest upon the provisions of the Constitution alone. In the case of a foreign judgment, the original cause of action is not so merged as to become incapable of being made the subject of a suit in this country".

386 Ibid.

387 § 95 Comment c (1), Restatement (Second) of Conflict of Laws (1988 Revisions).

388 In: *The East* 8 F C 265 (1877) it is stated that, "they had a right also to proceed *in personam*. Their lien was not merged in the judgment recovered in the Canadian court. Their cause of action was not satisfied by the recovery of the judgment. Until satisfaction, they have the right to enforce their lien"; In: *Eastern Townships Bank v H S Beebe & Co,* 38 Am Rep 665(1880) it is stated that, "this legal fact is conclusive against the idea of the notes as a cause of action being merged by that judgment. It leaves that judgment as an instrument or means of evidence, showing conclusively the fact of indebtedness, and operating conclusively to that effect until satisfied. It is not the judgment, but the satisfaction of it, that renders it a bar to a recovery in

some scholars have expressed doubts about why a foreign judgment cannot be used to preclude re-litigation instituted by the plaintiff who has already obtained a favourable judgment in a foreign court. It was argued that it is fair to prevent the plaintiff from repetitively pursuing his claim after he has obtained a favourable judgment in a foreign court,[389] and that it is a "disservice" to the development of conflicts law if the merger rule does not apply to foreign judgments.[390]

4.4.3 Precluding re-litigation for enforcement

As American courts do not consider the underlying cause of action merged after a foreign judgment has been rendered and in the absence of a statutory mechanism for the enforcement of foreign judgments, American courts cannot give effect to foreign judgments to preclude re-litigation for enforcement of foreign judgments.

4.4.4 Changes in American practice

Despite the fact that American courts traditionally favour local rules to determine the claim preclusion effect of foreign judgments, it can be found that American courts tend to change their approach. As the US law has broadened the scope of the claim preclusion effect of judgments,[391] if American courts keep following the traditional practice to apply local rules to determine the preclusive effect of foreign judgments, a foreign judgment is likely to have greater preclusive effect in the US than in the country of origin. On many occasions, it was held that a foreign judgment can never have greater effect than it is given by the law of the court of origin.[392] Therefore, it is necessary for American courts to refer to foreign law to make sure that the claim prelusive effect granted to the foreign judgments will not exceed the effect given by the law of the court of origin. In a more recent case,[393] in deciding whether to preclude a claim, the American court referred to English law. After confirming that the claim raised should be barred by the English judgment based on English law, it was held that the English judgment has the effect of precluding the claim from being litigated before the American court.

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the domestic government upon the original cause of action. This is in harmony with the conclusive effect given to a foreign judgment in favour of the defendant"; *Swift v David* 181 F 828 (9th Cir 1910).

389 Peterson (1972) p.232.

390 Ibid.

391 This will be discussed below in 4.5.1.3.

392 *Watts v Swiss Bank Corp* 265 N E 2d 739 (1970); *Schoenbrod v Siegler* 230 N E 2d 638 (1967); see also in Reporters' Notes 4 § 487 Restatement (Fourth) of Foreign Relations Law (2018). These are different from the holding in *Alfadda v Fenn* 966 F Supp 1317 (1997).

393 *RA Global Services, Inc v Avicenna Overseas Corp* 843 F Supp 2d 386 (2012).

Nevertheless, as it is required by the US law that the party who wants to assert the claim preclusion effect of foreign judgments under foreign law has to bear the burden of proof, otherwise, the US law will be assumed as the same as foreign law.[394] This in fact makes it possible for the party who wants to benefit from the broad claim preclusion effect under the US law to simply avoid proving foreign law but still get the benefit. Conversely, in my view, this seems to bring about too many difficulties for a foreign party to pursue the claims arising from the same accident against an American party if there was already a judgment between them concerning the same accident in a foreign country. The precondition for the new action is that under foreign law it is not precluded by the prior judgment.

4.5 Requirements for claim preclusion effects

When a court decides to give claim preclusion effect to a foreign judgment, it is important how the basic components for this effect must be understood. As has been shown, under Brussels Ibis, the autonomous claim preclusion effect only concerns the interpretation of the provisions therein. Under English and the US law, even if in some cases foreign law is also concerned, the local rules on claim preclusion still play a role. Therefore, the examination on the requirements for the claim preclusion effect will be conducted in the context of Brussels Ibis and the rules under English and the US law.

4.5.1 Same cause of action

It is generally recognized that the claim preclusion effect precludes re-litigation on the same cause of action.[395] If the second action is based on the same cause of action as the one in the first action, without any changes as to the supporting facts, the reliefs and remedies sought or the substantive legal basis, there is no question that the two actions have the same causes of action. However, the reality is that, a party who intends to re-litigate will probably make some changes to the first cause of action, in order to escape the claim preclusion effect of a prior judgment.

4.5.1.1 Brussels Ibis– the core issue theory for the prevention of contradiction

As discussed above, the autonomous claim preclusion effect for precluding re-litigation for contradictory result is mainly derived from the objectives of Brussels Ibis and the *lis pendens* rule. Therefore, the same cause of action should be interpreted in line with the

394 *Panama Processes, S A v Citites Service Co* 796 P 2d 276, 292 (1990); *Phillips USA, Inc v Allflex USA, Inc* 77 F 3d 354, 360 (10th Cir 1996); *Ventas, Inc v HCP, Inc* 647 F 3d 291, 303 (6th Cir 2011).

395 Zeuner and Koch (2012), ff. 23.

understanding of the objectives of Brussels Ibis and the interpretation of this particular concept under the rules of *lis pendens*.

It was held that the concept of the same cause of action under the *lis pendens* rule must be interpretated autonomously under Brussels Ibis.[396] The term "the cause of action" is translated from the terms "*objet*" and "*cause*" in the French text of Brussels Ibis.[397] As the French version prevails where the English version is not consistent with it, the interpretation of the same cause of action under the Brussels Regime should follow the French version.[398] Therefore, the same cause of action refers to the same object and the same cause.

Regarding the object, in *Tatry*,[399] the ECJ has held that the object means the end of the action, or the issue central to the action.[400] Regarding the cause, it refers to both the facts and the rules of law relied on as the basis of the action.[401] In *Gubisch*,[402] the cause was considered the same because both proceedings involved "the same contractual relationship". In *Maersk Olie & Gas A/S v Firma M De Haan en W de Boer*,[403] since the legal rules for liability for damages and for limitation of liability were different, the two proceedings were held as having different causes.

In some cases, the ECJ has not considered the cause at all when deciding whether the two proceedings concern the same causes of action.[404] In line with this, it is suggested that the object is "at root the only necessary requirement" for the same cause of action.[405] Two actions having the same object tend to share a common legal and factual basis, i.e. the same cause.[406] Where the common objective is to establish liability for breach of contract, it is hard to imagine that two actions do not share the same legal and factual basis. Conversely, where two actions share the same factual and legal basis, e.g. a single contractual relationship, this may still give rise to different claims with different objectives, such as a claim for damage to goods and a claim for the unpaid purchase price.[407]

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396 *Gubisch Maschinenfabrik KG v Giulio Palumbo* (Case 144/86) [1987] ECR 4861.

397 In the French version, "*le même objet et la même cause*" refers to "same cause of action", the two elements "object" and "cause" cannot be expressly reflected in German and English texts.

398 Fentiman (2011) p.585.

399 *The Tatry* (Case C-406/92) [1994] ECR I-5439.

400 Ibid.

401 Ibid.

402 *Gubisch Maschinenfabrik KG v Palumbo* (Case 144/86) [1982] ECR 4861.

403 *Maersk Olie & Gas A/S v Firma M de Haan en W de Boer* (Case C-39/02) [2004] ECR I-9657.

404 *Gantner Electronic GmbH v Basch Expolitatie Maatschappij BV* (Case C-111/01) [2003] ECR I-4207. "Article 21 of the Convention applies where two actions are between the same parties and involve the same subject-matter ... the subject-matter of the dispute for the purpose of that provision means the end the action has in view".

405 Fentiman (2011) p.586.

406 Ibid, see also Fentiman (2010) p.438-439.

407 Ibid. In fact, if a party seeks a contradictory result in the second action, he will not choose to claim for the unpaid purchase price after failing in the claim for damages to the goods.

Based on the reported national cases in relation to the same cause of the action under Brussels I,[408] it can be found that instances of the same cause of action mainly concern two groups. The first group of cases, following *Gubisch*,[409] concerns the situation where in one action, a party claims for A, and in the other action, the unsuccessful party claims against the basis for A and *vice versa*. For example, the German Federal Supreme Court considered that a claim for the invalidity of a contract and a claim for repayment of money paid under that contract are the same.[410] The second group of cases concerns situations similar to *Tatry*.[411] In one action, a party claims for A, and in the other action, the other party claims for not A.[412] For example, in *Evialis v SIAT*,[413] the insurers brought declaratory proceedings before an Italian court that they were not liable to compensate the damage of *Evialis*, the party interested in the cargo. Thereafter, *Evialis* commenced English court proceedings claiming indemnity based on the insurance contract. The two proceedings were considered as having the same causes of action. In a Dutch case, the court held that the Dutch action in which the claimant sought a declaratory judgment that he was not liable to pay damages and the Spanish action in which liability of the claimant in the Dutch proceedings was sought to compensate damages, have the same causes of action.[414] The common core of the above cases is that where the two actions may have conflicting results, they are likely to be considered as having the same cause of action under Brussels Ibis.

Therefore, if a foreign judgment from a member state is raised to preclude re-litigation aimed at contradicting the earlier decision from a court of another member state, Brussels Ibis basically requires the two causes of action to involve the same essential issues and objectives. It is not necessary that the two causes of action concern the same facts and the same rules of law, as long as the two actions are likely to lead to contradictory results.

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408 British Institute of International and Comparative Law, 'the Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, *Res judicata* and Abuse of Process' (2008).

409 *Gubisch Maschinenfabrik KG v Giulio Palumbo* (Case 144/86) [1987] ECR I-4861.

410 BGH NJW 1995, 1758, cited in British Institute of International and Comparative Law, 'The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, *Res judicata* and Abuse of Process: Germany' (2008) 54.

411 *The Tatry* (Case C-406/92) [1994] ECR I-54.

412 In *Glencore International AG v Shell International Trading and Shipping Co Ltd* [1999] 2 Lloyd Rep 692 (QB) Rix J held that " … more commonly, perhaps, the same dispute is raised in two jurisdictions when party A sues party B to assert liability in one jurisdiction, and party B sues party A in another jurisdiction to deny liability, or vice versa. In such situations, the respective claims of parties A and B naturally differ, but the issue between them is essentially the same".

413 [2003] 2 Lloyd's Rep 377 (QB).

414 *Hispa Fruit BV v Associazione Economica Produttori Ortofrutticoli SCARL*, Rechtbank Rotterdam 26 September 2007, ECLI:NL:RBROT:2007:BB7422, NIPR 2007, 326.

4.5.1.2 English law – distinct scopes based on different purposes of re-litigation

a Same cause of action in cases concerning re-ligation for contradiction

Under English law, where re-litigation is sought to contradict the earlier judgment, the requirement of the same cause of action is satisfied where the second cause of action merely concerns the existence or non-existence of the cause of action underlying the prior judgment.[415] The other situation is where the second cause of action is in fact a partial denial of the first action. For example, if the first judgment has determined that title to the goods belongs to A, a second action in which B claims that the money generated by the goods belongs to him, has the same causes of action as the first.[416]

In *Naraji v Shelbourne*,[417] it was held that the determination on the same cause of action should be decided based on "a strict test which is only met by identity with reference to the essential facts necessary to support the claim at the highest level of abstraction".[418] Therefore, if there are different facts which are necessary ingredients of the second cause of action, there will not be identity of causes of action.[419]

Nevertheless, if a party instituted a second action to seek a contradictory result based on a cause of action that should have been raised in the first action, the first judgment can still be used to bar the second action.[420] This is known as the *Henderson* rule. In this case, the scope of the same cause of action is extended. In *Fennoscandia Ltd v Clarke*,[421] the *Henderson* rule was invoked by the defendant who had been sued against in a Delaware court in the US by the English claimant. The defendant argued that the claim before the English court could and should have been raised in the American court. The court sustained the defendant's argument based on the *Henderson* rule and dismissed the suit. Conversely, where a claim could not be pursued or could not have been pursued in a foreign court, the prior foreign judgment has no claim preclusion effect as to precluding the claim from being pursued.[422]

b Same cause of action in case of re-litigation for additional satisfaction

If an action for additional satisfaction is instituted, the party who begins the second action may make some changes to the original cause of action to make the court believe that he has a new claim to sue. Even though English law does not require the party to join all causes

415 Barnett (2001) p.117, para. 4.80.
416 *Buckland v Johnson* 139 ER 375.
417 [2011] EWHC 3298 (QB).
418 *Naraji v Shelbourne* [2011] EWHC 3298 (QB).
419 Ibid.
420 *Henderson v Henderson* (1843) 3 Hare 100.
421 [1999] 1 All ER 35 (CA).
422 *Naraji v Shelbourne* [2011] EWHC 3298 (QB).

of action arising from the same transaction in a single action,[423] not all the available causes of action can be the basis for the second action. Some would be considered as the same causes of action as the original one and thus merged in the previous judgment. In this case the determination on the same cause of action should be based on the consideration of the facts of the case, the interests of the parties, the damages or the injuries concerned, or the remedies sought.

The identity of facts can be a decisive factor to establish the identity of causes of action, especially in a case concerning contractual disputes. In *The Indian Grace*,[424] the court precluded re-litigation on the claim for shortage of cargo based upon recognition of a judgment from an Indian court on cargo damages. It was held that it was "wholly unrealistic" that there could be more than one cause of action arising under a contract based on the same factual situation, even though there were several rights and obligations as provided by different terms of the contract. Based on this case, it has been generalized that several breaches under a single contract give rise to only one cause of action.[425]

In tort cases, the identity of facts is not enough to sustain the identity of causes of action. If two claims concern different interests of parties, they are normally considered separate and different causes of action even with the same facts. For example, where the first judgment only concerns a claim for damage to property and not the claim for personal injury, the claimant can still pursue the latter claim in a new action.[426]

Moreover, based on the same facts, the party may have more than one remedy to seek. If the remedies are alternative, they may have the same causes of action, since alternative remedies normally involve the same interests of the parties.[427] For example, a cargo owner can elect to sue the carrier in tort or for breach of contract with regard to cargo damage. In this case, both remedies concern the same interest of the cargo owner. Therefore, if the party elects to pursue one remedy in the first suit, he is prevented from pursuing the other in later proceedings. By contrast, if the remedies are cumulative, these might not concern the same cause of action. Cumulative remedies normally result from successive wrongs or from a continuing injury. Therefore, a subsequent action should not be barred by the judgment of the first action. For example, an action for the compensation of additional oil pollution damages should not be precluded by the first judgment on earlier pollution damage.[428] Neither should an action for compensation of additional sufferings from a

423 This is quite different from American federal law. Notably, if an unsuccessful party intends to use certain causes of action that should have been raised in the first proceeding to contradict the result, English courts prohibit him from doing so, see *Henderson v Henderson* (1843) 3 Hare 100.

424 *Republic of India v India Steamship Co Ltd; The Indian Endurance and the Indian Grace* [1993] AC 410, 420 (HL).

425 *Conquer v Boot* [1928] 2 KB 336, also see in Handley (2019) p.279.

426 *Brunsden v Humphrey* (1884) 14 QBD 141(CA).

427 Handley (2019) ff.276.

428 Freshwater v Bulmer Rayon Co Ltd [1933] Ch 162 (CA), 186.

serious disease caused by a serious physical injury be prevented by the first judgment on liability for the party's physical injuries.[429]

4.5.1.3 The US law – moving to the broadest transactional test

The traditional views on the concept of same cause of action have changed under the US law.

Initially, American courts held a view that "a plaintiff might have as many claims as there were theories of the substantive law upon which he could seek relief against the defendant" regarding one transaction,[430] which gives the narrowest scope to this concept. In line with this view, re-litigation was easy to pursue before American courts since the party could always find a new cause of action to sue. Gradually, the understanding of the concept of same cause of action has widened.

One view said that the same cause of action should be based on the "same right", "only where the same right is infringed by the defendant, does the case concern the same cause of action."[431] Where the plaintiff has only a single remedial right in the two proceedings and the facts arise from the same or connected transaction(s), differences in the grounds that support the right do not establish different causes of action.

In Baltimore Steamship,[432] a seafarer was injured while working aboard a vessel and sued the shipowner and the United States in a federal court by claiming negligence of the United States in providing a safe place to work, due to the fact that the vessel was not seaworthy. The court dismissed the seafarer's claim in respect of negligence but awarded him maintenance and cure. The seafarer then filed a second claim against the shipowner regarding the same incident but with a different allegation regarding negligence of the shipowner based on the same facts. The Supreme Court found that the previous judgment precluded the second action since it had the same cause of action as the first action. The Court held that:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action."[433]

429 Handley (2019) p.277.
430 § 24 Comment a, Restatement (Second) of the Judgment (1982).
431 In: *Baltimore Steamship Co v Phillips* 274 US 316 (1927).
432 Baltimore Steamship Co v Phillips 274 US 316 (1927).
433 Ibid. 321.

There is also a view that "wrongful conduct" and the "wrong for which redress is sought" can establish identity of the cause of action.[434] However, its practicability was doubted as it is difficult to predict at the time the action is instituted which conduct the courts will determine as the wrongful act underlying the respective causes of action.[435] Another view is that the same or connected facts may be used separately and become dramatically different evidence to support different "rights" and "wrongs". Therefore, the same cause of action can only be established where "the evidence necessary to sustain judgments in both actions is the same".[436] However, it was held later that the same evidence requirement is a positive rather than a negative test. This means that in some situations the second action may still be considered as the same cause of action although the evidence invoked differs from that in the prior proceedings.[437]

The Federal Rules of Civil Procedure in 1938 had a great impact on the understanding of the same cause of action by American courts, especially the federal courts,[438] which leads to the broadest view on the concept of same cause of action. In *United Mine Workers of America v Gibbs*,[439] the Supreme Court rejected its previous narrow test in *Baltimore Co v Phillips* and held that,

> "With the adoption of the Federal Rules of Civil Procedure and the unified form of action, Fed. Rule Civ. Proc. 2, much of the controversy over 'cause of action' abated. The phrase remained as the keystone of the Hurn test, however, and, as commentators have noted, has been the source of considerable confusion. Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[440]

Similarly, it was held in Williamson v Columbia Gas & Electric Corp that,[441]

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434 *Roach v Teamsters Local Union* 595 F 2d 446 (8th Cir 1979); *Midcontinent Broadcasting Co v Dresser Industries, Inc* 669 F 2d 564 (8th Cir 1982).

435 Mule (1978) p.174.

436 *Lawrence v Vernon* 15 F Cas 8146 (1837).

437 *Ruskay v Jensen* 342 F Supp 264(1972); *Towle v Boeing Aireplane Co* 364 F 2d 590 (1966), see also § 24 Comment a Restatement (Second) of the Judgment § 24 (1982).

438 *Nevada v US* 463 US 130 (1983): "Definitions of what constitutes the 'same cause of action' have not remained static over time. Compare § 61 Restatement of Judgments (1942), with § 24 Restatement (Second) of Judgments (1982)."

439 383 U S 715 (1966).

440 383 U S 715 (1966). The *Hurn* test means the test of "primary right" of the plaintiff that has been established in the Supreme Court case *Baltimore Co v Phillips*, 274 US 316.

441 186 F 2d 464 (3rd Cir 1950).

> "…A reading of the early cases as compared with recent ones makes it clear that the meaning of 'cause of action' for res judicata purposes is much broader today than it was earlier. Formerly the whole aim in pleading, and in the elaborate system of writs, was to frame one single legal issue… 'cause of action' came to have a very narrow meaning. If the theory in the second suit was unavailable under the writ used in the first suit, the plaintiff had no opportunity to litigate it there and so the plaintiff was not barred by res judicata. The force of the rule is still operative but the scope of its operation has been greatly limited by the modernization of our procedure. The principle which pervades the modern systems of pleading, especially the federal system, as exemplified by the free permissive joinder of claims, liberal amendment provisions, and compulsory counterclaims, is that the whole controversy between the parties may and often must be brought before the same court in the same action ..."[442]

The broadest transnational view is that a claim includes all the remedial rights of the plaintiff against the defendant growing out of the relevant transaction or series of connected transactions.[443] The "transaction" should be understood pragmatically in the sense that "whether the facts are related in time, space, origin, or motivation, and whether they form a convenient trial unit" are particularly significant factors in assessing the elements of a litigated transaction.[444] It has been suggested that the broadest transnational view on the cause of action is big enough to include, different harms; different evidence; different legal theories, whether cumulative, alternative or even inconsistent; different rights and remedies, whether legal or equitable and a series of related events.[445] A simply example can show how broad the cause of action will be based on the transnational test. As mentioned above,[446] under English law, if a party has two remedies based on the same facts but the two remedies are cumulative, the action for one of the remedies does not have the same causes of action as the second action for the other remedy. For example, if some land was wrongfully possessed, a plaintiff is entitled to claim repossession of the land in the first action and then claim the damages for the wrongful detention in the second, as these two remedies are cumulative. However, based on the transnational view, the first judgment should preclude the second action even though the remedies are of cumulative nature.[447]

442 Ibid.
443 § 24 Restatement (Second) of the Judgment (1982).
444 Ibid.
445 Clermont (2016) p.1108.
446 See Chapter 4 Section 4.5.1.2 b.
447 § 25 Comment j, Restatement (Second) of the Judgment (1982).

The transnational view has been accepted by the federal courts,[448] and also by many state courts.[449] Thus, it follows that the scope of the claim preclusion effect of judgments under federal law and some state laws will be broad. Therefore, it can be presumed that if a party raises a foreign judgment to preclude an action before a court which applies the transnational view to determine the claim preclusion effect of foreign judgments, this foreign judgment is likely to have greater effect than it is accorded by the law of the country of origin.[450] As observed by Von Mehren,

> "To illustrate, the policy against duplication of effort should presumably be measured against a system's domestic procedural thinking about 'splitting' a controversy that could conveniently be handled as a single matter. Procedural thinking in the United States tends toward enlarging the dimensions of a lawsuit: consider especially the broad notion of 'cause of action' and the federal rules respecting compulsory counter-claims. Many countries, however – for example, Germany and France – are prepared to allow the parties, if they desire, to fragment a controversy that could be handled as a single matter. A jurisdiction like those in the United States presumably puts a fairly high general value on avoiding duplication of effort while jurisdictions like France and Germany assign a lower value. The former group's recognition practice will to this extent accord broader preclusive effects than the latter's."[451]

4.5.2 Same parties

4.5.2.1 Brussels Ibis

As for the determination of the same parties, no difficulties arise where one party legally succeeds another party, such as the successor of a deceased, or statutory succession of title.[452] Controversies mostly lie in cases concerning two parties who are connected based on certain interests. In *Drouot*,[453] the hull insurer of the vessel claimed against the cargo owner and its insurer for their contribution in general average before a French court. However, the cargo owner and its insurer challenged the suit by contending that they had obtained a declaratory judgment against the shipowner in the Netherlands that they were

448 Wagner (1987) §8[a] and [b].
449 Shapiro (2001) p.35-37.
450 See Brummett (1988) ff.83, "who advocates to use federal preclusion law to determine the preclusive effects of foreign judgments on federal diversity jurisdiction".
451 Von Mehren and Trautman (1968) p.1604.
452 Jacob van de Velden (2008) p.17.
453 *Drouot Assurance SA v Consolidated Metallurgical Industries* (Case C-351/96) [1998] ECR I-3075.

not obliged to contribute in general average. Therefore, the French court should dismiss the proceedings.

As the French court was not sure whether the two suits concerned the same parties as required by the *lis pendens* rule,[454] it referred the question to the ECJ. Based on the facts of the case, the ECJ held that, as the two suits both concerned the obligation to contribute to the general average, it made the hull insurer and the shipowner have identical interests in the case. A judgment against one of them would also be against the other. Therefore, the French proceeding and the Dutch proceeding had the same parties.[455] The cargo owner and its insurer further argued that the hull insurer was not party to the Dutch proceeding, according to the Dutch procedural rules. The ECJ however held that national procedural rules that restrict a party from being a party in the proceeding were of no relevance to determine the requirement of the same parties under the Brussels regime.

Following this case, in *Kolden Holdings Ltd v Rodette Commerce Ltd*,[456] the English Court of Appeal gave a looser interpretation on the same parties. In this case, the Cypriot companies (C) initiated declaratory proceedings in England, with regard to a Russian company's (R) failure to transfer shares to another company pursuant to a transfer agreement between them. Subsequently, C assigned their shares to K. Then R initiated proceedings in Cyprus against K seeking a declaration that R was not obliged according to the transfer agreement. Later, K was substituted as claimant in the English proceedings. R applied to stay these English proceedings based on the *lis pendens rule*. Regardless of the time sequence of each event, the Court of Appeal held that, as C and K had identical and indissociable in interests, the English proceeding and the Cypriot proceeding had the same parties. Therefore, the Cypriot proceedings should be stayed.[457]

To eliminate repetitive proceedings and conflicting judgments, the interpretation of the same parties under Brussels Ibis is purpose-oriented and may disregard provisions of civil procedural law of the member states[458] or it may seem strange from the perspective of national courts.[459] Despite this, it should still be noted that related parties with identical

454 Article 21 Brussels Convention 1968, now Article 29 Brussels Ibis.

455 Ibid.

456 [2008] Lloyd's Rep 434 (CA).

457 Ibid. The English court also held that "whether the interests of the entities were identical and indissociable, it was for the national court to ascertain whether that was in fact the case."

458 See the opinion of Advocate General Langemeijer in *Hooge Huys Schadeverzekeringen NV v X,* Hoge Raad 20 January 2006, ECLI:NL:HR:2006:AT6013, Schip & Schade 2007,118, cited by Jacob van de Velden, British Institute of International and Comparative Law, 'the Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process: Netherlands' (2008) 45. Under Dutch law, even though the insured and insurer have identical interests in accordance with *Drouot*, if the insured did not join the proceeding between the insurer and the injured party, the insured and insurer are not treated as the same parties by Dutch courts.

459 It is reported that the interpretation of the same parties based on identical interests is exceptional among national courts, see in Jacob van de Velden (2008) p.25.

interests in suits, such as the assignor and the assignee,[460] the guarantor and the guarantee, the agent and the principal, the company and its wholly-owned subsidies,[461] can be considered the same parties under Brussels Ibis.

4.5.2.2 English law

The interpretation of the concept of the same parties is not very different in relation to domestic and foreign judgments. Under English law, the same parties include the parties themselves and their privies. In principle, parties can be deemed as the same parties even though they lack physical identity.[462] Where two parties claim or defend the same rights and litigate in the same capacity, they are the same parties under English law.[463] In terms of the privies, there are three categories, namely, privies in blood, privies in title and privies in interest.[464] Privy in blood means a person who has a blood connection with a party and who inherits the rights and obligations of that party. Privy in title means a person who succeeds to the titles of a party, especially his title to land and estate.[465] Privy in interest means a person who has an interest in the previous litigation or the subject matter.[466] A mere interest in the outcome of litigation cannot make the party a privy in interest.[467]

Among these three types of privies, privy in interest is the least clear.[468] In order to determine privy in interest, two steps can be followed. First, the party should have an interest. It has been held that, if a party has no interest in the action, such as a solicitor on behalf of a party, he is not a privy in interest.[469] However, there is an exception to this. In some cases, a defeated party may deliberately employ an assistant to infringe the right

460 For example, in a German case OLG Köln IPRax 2004-2 Wx 34/03, the German court held that the Greek proceeding instituted by the assignor against the defendant and the German proceeding instituted by the assignee against the defendant have same parties under the Brussels Regime.

461 Rogerson (2015) para.11.24.

462 Barnett (2001) p.65-66. The author contended that English law refers to the Roman law in this regard, in particular, "it is part of Roman doctrine of *res judicata*, as it is of the English, that this identity of parties must be not only physical, but jural, so that two distinct persons physically may have one and the same character, or *persona*, whilst one and the same person in a physical sense may, if litigating in two different capacities, constitute two distinct *personae*."

463 *Marginson v Blackburn Borough Council* [1939] 2 KB 426 (CA): "a party has different capacities in proceeding against him for damages to the bus company and in proceedings concerning claims against the bus company on behalf of his wife." *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54: "It has also been held that a judgment against A in one capacity does not bind in another capacity … ".

464 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] AC 853, 910 (Lord Reid), 936 (Lord Guest) (HL).

465 *Wiltshire v Powell* [2004] EWCA Civ 534; [2005] QB 116, 36 (CA). The court held that that an estoppel by reason of privity should be restricted to those whose claim to title to aircraft arose after judgment.

466 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] AC 853, 910, see also in Sheppard (2005) ff.226.

467 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1970] Ch 506.

468 Ibid, in which Scott J said, " … no authority which indicates at all clearly what kind of interest in earlier litigation relied upon as constituting a *res judicata* is sufficient to render someone, who was not a party and is not a successor in title to a party to that litigation, privy to a party for the purposes of the doctrine."

469 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] AC 853.

established in earlier litigation. This may lead the party who won the earlier litigation to bring a new action against the servant. In this situation, if the servant was considered as different from the defeated party because he has no interest in the suit, it would mean that the defeated party could annoy the winning party by re-litigating the original question by putting forward his servant.[470]

Second, if a party has an interest in the subject matter or in the previous litigation, a sufficient degree of identity in the interest is required to make him become privy in interest. In this sense, privy in interest usually takes place in circumstances where two parties have connected interests based on an agreement, such as between trustees and beneficiaries[471] or between employer and employee.[472]

4.5.2.3 The US law

Similar to the privy doctrine under English law,[473] in the Restatement (Second) of Judgments, it is explicitly stated that the successor of title,[474] and the successor of the deceased,[475] can be the same parties to the judgment and subject to the claim preclusion effect.

Furthermore, American courts are more flexible on what constitutes the same parties for the claim preclusion effect than English courts have, especially based on federal law.[476] The same parties for establishing claim preclusion may also concern legal relationships,

470 Ibid.

471 *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54.

472 *Kinnersley v Orpe* 99 ER 330 (1780) (KB).

473 See Chapter 4 Section 4.5.2.

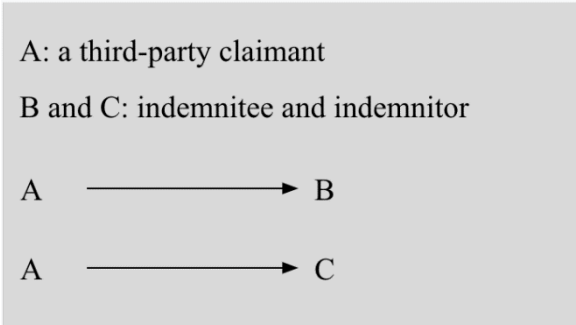
474 § 43 Restatement (Second) of the Judgment (1982): "a judgment in an action that determines interests in real or personal property: (1) With respect to the property involved in the action: (a) Conclusively determines the claims of the parties to the action regarding their interests; and (b) Has preclusive effects upon a person who succeeds to the interest of a party to the same extent as upon the party himself ..."

475 § 45 Restatement (Second) of the Judgment (1982): "when a person has been injured by an act that later causes his death and during his lifetime brought an action based on that act: (1) If the action proceeded to judgment for or against the injured person before he died, his successor under a survival of claims statute is precluded by that judgment to the same extent as the injured person would have been … "

476 With regard to the requirement for the claim preclusion effect of judgments, English courts still hold that the privy doctrine is essential to sustain the claim preclusion effect of judgments. They generally do not make any extension as to the concept of same parties that has widely been accepted by American courts. In *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510, it was held that, "I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party."

such as trustee and beneficiary, executor or administrator and beneficiary,[477] bailee and bailor,[478] assignor and assignee,[479] indemnitor and indemnitee,[480] etc.

Figure 1



Taking the cases concerning an indemnification relationship as an example, if B and C have an indemnification relationship,[481] an action brought by a claimant against one of them may preclude an action brought by the same claimant against the other. Specifically, if claimant A fails in the action against B, A is precluded from suing against C. The rationale is that, if A fails in the first action, but A is not precluded from bringing a second action against C, there would be inconsistent judgments if A won the second action. In this case, even though A is not allowed to sue against C, it is not unfair for him as he has already had the opportunity to litigate against B.[482] However, if A's claim does not trigger the right of indemnification, such as a claim personal to the indemnitee, the first judgment has no claim preclusion effect on the second action.

4.6 Concluding remarks

From the above, a general observation is that courts in the selected jurisdictions do not always adopt the prevailing approaches with regard to granting claim preclusion effect to

477 § 41 Restatement (Second) of the Judgment (1982).
478 § 52 Restatement (Second) of the Judgment (1982)
479 § 55 Restatement (Second) of the Judgment (1982): "A judgment in an action by either the assignee or the assignor against the obligor of an obligation that has been assigned precludes a subsequent action on the obligation by the other of them if the person maintaining the action had power to discharge the obligation."
480 Wright, Miller and Cooper (2002) § 4463.
481 For example, a sub-contractor and the main contractor liable for the entire contract, a driver and a car owner who has owner's liability.
482 Wright, Miller and Cooper (2002) § 4463.

foreign judgments. Moreover, a crucial element concerning the courts' recognition of the claim preclusion effect of foreign judgments is the purpose of re-litigation.

Under Brussels Ibis, foreign judgments are granted certain autonomous claim preclusion effects based on the interpretation of the objectives of Brussels Ibis, specific provisions, and holdings of the ECJ. This autonomous claim preclusion effect of foreign judgments precludes re-litigation for a contradictory result as well as for enforcement of foreign judgments.

English courts adopt a unilateral approach to recognize the claim preclusion effect of foreign judgments. This implies that English law is used to determine the claim preclusive effect of foreign judgments. In theory, a recognized foreign judgment should have the same claim preclusion effect as domestic judgments. In practice however, foreign judgments have an absolute effect only to preclude re-litigation for contradictory results, whereas this is less so with regard to re-litigation for additional satisfaction. Finally, if a foreign judgment falls within the scope of statutory recognition frameworks, it also precludes re-litigation for enforcement purposes.

Even though there are two prevailing approaches under the US law, American courts tend to follow the first approach, i.e. to recognize the claim preclusion effect of foreign judgments based on the local rules. Based on the rule of bar, American courts recognize the effect of foreign judgments in terms of precluding re-litigation for a contradictory result. As the rule of merger does not apply to foreign judgments, American courts will not recognize the effect of foreign judgments in precluding re-litigation for additional satisfaction. Neither does the US law recognize the effect of precluding re-litigation for enforcement of foreign judgments. However, with the increasing scope of the claim preclusion effect under the US law, there appears a trend that American courts change to the second approach to determine the claim preclusion effect of foreign judgments in order not to give them greater effect than they are accorded by the law of the court of origin.

After examining the specific requirements for invoking the claim preclusion effect in the selected jurisdictions, it can be found that the scope of same causes of action and same parties varies. Even within a single jurisdiction, the interpretation of same causes of action varies when the claim preclusion effect of judgment is invoked for different purposes. Under Brussels Ibis, the autonomous claim preclusion effect of foreign judgments requires the interpretation of the same cause of action to be based on the autonomous meaning given by the ECJ. If two actions concern the same essential issues or objectives and may result in conflicting results, they can be considered as having the same causes of action under Brussels Ibis. Under English law, where re-litigation is sought to contradict the earlier judgment, the requirement for the same cause of action is satisfied where the second cause of action concerns the existence or non-existence of the first cause of action underlying the prior judgment and where the second cause of action is a partial denial of the first. If the cause of action of the second action should have been raised in the first

action, English courts may still consider the second action has the same cause of action as the first action, based on the *Henderson* rule. Where re-litigation is for seeking additional satisfaction, the determination of the same cause of action is related to the facts of the case, the interests of parties, the damages or the injuries concerned, or the remedies sought. The identity of facts can be a decisive factor to establish the identity of causes of action, especially in a case concerning contractual disputes. However, in tort cases, it still needs to be considered whether the same interests of the parties are involved and whether the remedies are cumulative. Under the US law, the traditional views on same cause of action are similar to English law, the same cause of action may concern the same rights, the same wrongful conducts, or the same evidence. However, with the introduction of the transnational view, causes of action that are based on different remedial rights of the plaintiff against the defendant arising from the same transaction can be considered as one single cause of action.

As for the requirement of the same parties, under Brussels Ibis, parties with identical and indissociable interests can be considered as the same parties. To preclude conflicting judgments, the interpretation of the same parties is purpose-oriented and may even disregard provisions of the civil procedural law of member states. English courts persist in a strict interpretation of the same parties, namely privy in blood, privy in title and privy in interest. Most problematic of these is the privy in interest. A party who alleges to be the same party as one in the previous proceedings should firstly have an interest in the previous litigation or the subject matter. Secondly, there should be a sufficient degree of identity in the interest to make him privy in interest. Under the US law, the traditional views on what constitutes the same parties are similar to English law. However, several recognized exceptions make the scope of the same parties become broad, especially in cases concerning indemnification relationships. Specifically, a party can invoke a previous judgment favourable to the defendant to preclude a second action against himself if the party and the previous defendant have qualified indemnification relationships.

In comparison, as the autonomous claim preclusion effect of judgments under Brussels Ibis is detected from the interpretation of the objectives, *lis pendens* rule and case law, it does not rely on any national laws. This makes it easy for parties to attain such autonomous effect. The practice under Brussels Ibis also shows that if the claim preclusion effect of foreign judgments can be clearly provided in a uniform way, the significance of the first action will be further increased. However, this may also foster a race for judgment. Outside of the uniform rules, the unilateral approach adopted by English courts is effective in the sense that courts will not be troubled with the meaning of foreign laws and the parties will not bear the burden of proof of foreign laws. Furthermore, the effect of foreign judgment under English law can be easily predicted. However, the downside lies in that a judgment may have lesser or greater effect than it has in the country of origin. With regard to the American practice, it is laudable that American courts now turn to a more international

view to give claim preclusion effect to foreign judgments in accordance with the law of the country of origin. However, it should be admitted that this approach expects a higher capacity from the party who wants to invoke the claim preclusion effect, as he is required to prove the foreign law. If the party cannot fulfil his burden of proof, American courts will still follow the local rules and assume the local rules are the same as foreign laws. If this happens, the party has to bear the consequences of the broad claim preclusion effect of judgments and be deprived of the rights to litigate in the US.

In all three jurisdictions, a foreign judgment can be used to preclude a subsequent proceeding in which a contradicting result is sought. Brussels Ibis seems most favourable for such effect, as one of the objectives of Brussels Ibis is to minimize conflicting judgments between EU member states,[483] while under English law and the US law, whether a party can invoke such an effect basically relies on the court's discretion. In terms of the effect of foreign judgments in precluding re-litigation for additional satisfaction, Brussels Ibis is silent about this, while English law has the tendency to enhance such an effect of foreign judgments. As the US law has broadened its scope of claim preclusion due to its change in the understanding of the concept of cause of action,[484] American courts are more likely to refer to foreign laws to resist such an effect rather than to rely on local rules to sustain this effect. In terms of the effect of foreign judgments in precluding re-litigation for enforcement of judgments, the ECJ has confirmed such an effect under Brussels Ibis.[485] This is also the case if the foreign judgment falls within the two English statutes. Under the English common law and the US law, a party's re-litigation with an enforcement purpose can hardly be precluded.

483 Recital 21 Brussel Ibis.
484 See Chapter 4 Section 4.5.1.3.
485 *Jozef de Wolf v Harry Cox BV* (Case-42/76) [1976] ECR 1759.

5 Recognition of Foreign Judgments and Issue Preclusion Effects

5.1 Introduction

Apart from the preclusion effect of barring the same claim from being litigated again between the same parties, the second prong of the doctrine of *res judicata* concerns the issue preclusion effect of judgments. Issue preclusion means that certain issues that have been adjudicated by the previous judgment can bar subsequent re-litigation on the same issues. The purpose of issue preclusion is not to eliminate repetitive litigation, but to narrow the area of dispute in the second proceedings and to decrease the possibility of conflicting judgments, by preventing re-litigation on the same issues. Compared with claim preclusion, issue preclusion does not require the second proceeding to have the same cause of action as the first one. In the domestic context, issue preclusion is widely recognized among common law countries, whereas countries belonging to the civil law tradition adopt a more restricted approach.[486] As discussed in Chapter 3, in all the selected jurisdictions there are legal bases and leading approaches for the issue preclusion effect of foreign judgments. The following discussion will examine how and to what extent this effect is given to foreign judgments in practice.

5.2 Brussels Ibis

5.2.1 The prevailing approach?

There are distinct differences in the scope of issue preclusion among member states of the European Union. In Germany, the scope of issues that can have a preclusive effect is quite limited. Only the court's view of the claim or the counterclaim is considered binding. Accordingly, issues beyond the claim and counterclaim should not have any consequence

486 It is reported that in Germany, France, Sweden basically no or only quite limited issue preclusion effect is granted to judgments. By contrast, the Netherlands, embraces the issue preclusion effect, see in Jacob van de Velden (2008) p.27.

between the parties.[487] By contrast, Dutch law grants a broader issue preclusion effect to judgments. Issue preclusion may extend to findings on issues covered by the judgment explicitly or implicitly. Explicit findings on issues refer to those issues raised by the parties. Moreover, implicit findings on issues refer to issues left undisputed by the parties, but which must be assumed by the court. If parties failed to dispute these issues in the previous proceeding, they lose the chance to re-assess them in later proceedings.[488]

If the prevailing approach is adopted, the law of the court of origin would serve as a preliminary determinator of the issue preclusion effect of the foreign judgment, and later on, as implied by Article 54 (1) Brussels Ibis, the court addressed is supposed to lend its supervision to determine in which way the same or equivalent effect can be achieved under its own procedural laws. However, if the law of the court of origin grants broader issue preclusion effect than under the law of the court addressed, it is uncertain how the court addressed will react when faced with a foreign judgment from such a court of origin.[489]

However, in practice, the issue preclusion effect of foreign judgments may not only concern rules on preclusion, but also relevant substantive rules. And it seems that courts of the member states may only consider substantive rules from the court of origin to determine the content of the "issues" and disregard whether and to what extent judgments have issue preclusion effect in the court of origin.

In *NV IDAT v B.J.G.*,[490] a Belgian court had decided in favour of claimant *IDAT* regarding the defendant's obligation to pay for the purchase of the carpet stores. Before the Dutch court, *IDAT* sued in tort against G, the defendant's manager, demanding that G uses his funds deposited in a Dutch bank to pay the purchase price owed by the defendant. At the first instance, the court sustained *IDAT*'s claim. However, the court of appeal reversed the judgment.

It is clear that in this case the crucial points were: whether the payment obligation bound G, and whether the Belgian court's determination on this issue should have a preclusive effect. The first question concerns substantive rules, whereas the latter regards preclusion law. Referring to Belgian law, the Dutch court of appeal held that, G, as manager, only has the obligation to promote the payment. Therefore, the obligation to pay did not

487 Heize (2008) p.37. Recently, in Germany there is a broadening view as to the issue effect of judgments. Even if the judgment does not directly decide a specific issue that is a necessary preliminary issue in the second proceeding but which is closely related to the latter, the previous judgment can have binding effect on the second proceedings in respect of these issues. E.g. if the first judgment concerns the obligation to delivery of goods, then in the second proceedings where the claim for payment is sought, the validity of the contract can no longer be contested. However, arguably this broadening view is limited only to cases where two proceedings are closely connected, see in Zeuner and Koch (2012) p.28.

488 British Institute of International and Comparative Law, 'the Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, *Res judicata* and Abuse of Process: Netherlands' (2008) 58.

489 Jacob van de Velden (2014) p.345; Fitchen (2015) p.391.

490 Hoge Raad 12 March 2004, ECLI:NL:HR:2004:AO1332, NJ 2004, 284 with comment from P Vlas.

bind G personally. Given this, the Dutch Supreme Court rejected IDAT's claim. It can be observed that the Dutch Supreme Court recognized the determination by the Belgian court without considering any rules on issue preclusion under Belgian law.

5.2.2 Issues on jurisdiction

In the case law of the ECJ, certain autonomous issue preclusion effects of foreign judgments under Brussels Ibis have been confirmed, especially with regard to determinations on jurisdiction.

5.2.2.1 Foreign judgments merely on jurisdiction

On many occasions, after considering the issue of jurisdiction, a court will dismiss the action due to the lack of jurisdiction. The resulting judgment and the underlying reasoning in this case concern no substantive rights and obligations between the parties, but merely the question of jurisdiction.

In *Gothaer*,[491] the Belgian court dismissed an action instituted by cargo insurers against the carrier based on a determination of the validity of the jurisdiction clause in the bill of lading. After this, the cargo insurers commenced a new action in the German court. The German court was not sure whether it was bound to recognize the Belgian judgment dismissing the action and whether the scope of recognition extended to the determination of the validity of the jurisdiction clause. Therefore, it referred preliminary questions to the ECJ. The ECJ first confirmed that the judgment which declines the jurisdiction of the court falls within the scope of Brussels I (now Brussels Ibis), therefore, it can be recognized. Furthermore, the ECJ held that the concept of *res judicata* under European Union law does not attach to the operative part of the judgment in question, but also to the *ratio decidendi* of that judgment. In the light of this, the findings on the validity of the jurisdiction clause underpinning the judgment has *res judicata* effect and should not be challenged further.[492]

5.2.2.2 The effect of the determination on jurisdiction contained in a foreign judgment

Under Brussels Ibis, the defendant is entitled to appear before the court of origin to challenge the jurisdiction without submitting to that court.[493] If a court confirms its jurisdiction after considering the challenge by the opposing party, the court's proceedings

491 *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH* (Case C-456/11) ECLI:EU:C:2012:719.
492 Ibid, para. 41.
493 Article 26 (1) Brussels Ibis.

will proceed further. In this scenario, according to Article 45(1) Brussels Ibis, except in certain circumstances,[494] where, in particular, the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer, or the employee was the defendant, and where an exclusive jurisdiction agreement was concerned, the court addressed should not review the jurisdiction of the foreign court. This implies that the determination on the jurisdiction by the court of origin is binding on the court addressed. And it also means that except in certain circumstances, a defendant who does not challenge the foreign court's jurisdiction before the court of origin where he was able to do so, loses the right to challenge jurisdiction, and will not have the chance to challenge this jurisdiction before the court addressed at the stage of recognition. If the defendant wants to challenge the jurisdiction of the court of origin or he feels that there are errors as to the facts or laws concerning the issue of jurisdiction, the defendant has to appeal in the country of origin.[495]

In contrast, where the exceptions take place, the court addressed is not bound by the determination on the jurisdiction by the court of origin and is able to review the jurisdiction of the foreign court.[496] In fact, as regards these situations, the court of origin has the obligation to inform the defendant of the right to challenge the jurisdiction.[497] This means that in these cases the defendant has two chances to challenge the jurisdiction of the court of origin. Nevertheless, in this case, Brussels Ibis provides that the court addressed should still be bound by the findings of the fact on which the court of origin based its jurisdiction.[498]

In *Gothaer*,[499] the ECJ further held that the binding effect as to the jurisdiction of the court of origin should only be determined at EU level and not by national laws. It was held that,

> "……the exclusion of review of the jurisdiction of the court of the member states of origin implies, as a correlation, a restriction of the power of the court of the member states in which recognition is sought to ascertain its own jurisdiction because the latter is bound by what was decided by the court of the member state of origin. The requirement of the uniform application of EU law means that the specific scope of that restriction must be defined at EU level rather than vary according to different national rules on res judicata."[500]

494 Article 45 (1) (e) Brussels Ibis.
495 Francq (2016) p. 931.
496 Article 45 (1) (e) Brussels Ibis.
497 Article 26 (2) Brussels Ibis.
498 Article 45(2) Brussels Ibis.
499 *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH* (Case C-456/11) ECLI:EU:C:2012:719.
500 Ibid.

5.2.3 Other issues?

Article 52 Brussels Ibis provides that the court addressed shall not review the substance of a foreign judgment. Does this mean that all issues contained in the foreign judgment should not be reviewed and have autonomous preclusive effect? In *Gantner*,[501] the ECJ was requested to decide whether the determination of the legal nature of the relations between the parties by a court of a member state was binding in order to settle a claim in the court of another member state under the Brussels Convention 1968. The ECJ declined to rule on the referred question as it did not concern the interpretation of the Brussels Convention but should be decided by national courts based on national law.[502] It follows that not every decided issue has the autonomous issue preclusion effect under the rules of Brussels Ibis.

5.3 English law

5.3.1 Unilateral approach confirmed

The practice of the preclusive effect of judgments as to certain issues developed quite early in the English courts.[503] However, it was not conceptualized as an "issue estoppel" until the 1960s.[504] As discusses above,[505] English courts adopt a unilateral approach based on English law to recognize the issue preclusion effect of foreign judgments. If a foreign judgment can be recognized, it can have an issue preclusion effect before English courts in the same way as domestic judgments.

In *Carl Zeiss Stiftung v Rayner & Keeler Ltd*,[506] the House of Lords summarized three requirements for the issue preclusion effect of foreign judgments. First, the judgment should be final and conclusive and rendered by a competent jurisdiction on its merits. Secondly, the issue preclusion effect can be relied on between the same parties and privies. Thirdly, the issues that create an estoppel should be the same. As for the first requirement, it entirely echoes the requirements for recognition of foreign judgments. In addition to the requirements for recognition, the issue preclusion effect of foreign judgments is restricted to the same parties and the same issues.

501 *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* (Case C-111/01) [2003] ECR I-4207.
502 Ibid.
503 *Duchess of Kingston* 168 ER 175 (Crown Cases Reserved).
504 The phrase "issue estoppel" was first used by Diplock L.J. in case *Thoday v Thoday* [1964] 1 All ER 341, see also in *Arnold v National Westminster Bank Plc* [1990] Ch 573 (CA). For consistency, the term of issue preclusion will also be used in the discussion under English law.
505 See Chapter 3 Section 3.3.1.
506 [1967] 1 AC 853 (HL).

Apart from court practice under the common law, issue preclusion can also be sought based on Statute Law. In *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*,[507] the Court of Appeal held that Section 8(1) 1933 Act dealt with "cause of action estoppel" and Section 8(3) 1933 Act with "issue preclusion". When the case reached the House of Lords, Lord Diplock stated that,

> "the foreign court may have incidentally decided other matters of fact or law essential to the plaintiffs claim to be entitled to the remedy or to the defendant's answer to that claim, whether decisions of this kind will be embodied in the same document which contains the dispositive or operative part of the foreign judgment will depend upon the practice followed by the foreign court; and the conclusiveness attaching to such incidental decisions in subsequent litigation in the country of the foreign court between the same parties but not founded on the same cause of action, will depend upon the extent to which the foreign system of law incorporates a principle similar to the English doctrine of issue estoppel … it is based on public policy and section 8(3) of the Act preserves it as respects foreign judgments, whether or not the system of law of the foreign country incorporates a similar principle."[508]

5.3.2 Issues of fraud

In practice, the issue preclusion effect of foreign judgments has become an effective tool for judgment creditors to prevent repetitive attacks against the validity of foreign judgments. Therefore, it can be found that several important requirements for the recognition of foreign judgments, such as the issues of fraud and jurisdiction, have been raised by parties who seek to escape from their preclusive effect.

In *House of Spring Gardens Ltd v Waite*,[509] the defendant argued that an Irish judgment had been obtained fraudulently, in order to frustrate its enforcement before the English court. Considering however that the Irish court had determined the issue of fraud, the Court of Appeal held that, if an allegation of fraud has been made and determined abroad, in the absence of plausible evidence showing at least a prima facie case of fraud, the court has discretion to decide whether the justice requires the further investigation of alleged

507 [1974] QB 660.

508 [1975] AC 591. Lord Viscount Dilhorne and Lord Simon of Glaisdale stated that Section 8(3) 1933 Act was not intended as a substantive provision to deal with issue estoppel in contradiction to cause of action estoppel dealt with in Section 8(1), but had only been inserted as a saving provision to assure the conclusive effect of foreign judgments.

509 [1991] 1 QB 241 (CA).

fraud or whether the judgment creditor should not be frustrated in enforcing the foreign judgment.[510]

Similarly, in *Owen Bank Ltd v Etoile Commerciale SA*,[511] considering tthat he issue of fraud had been decided by the foreign judgment, the Privy Council held that it would be an abuse of process if the bank repetitively raised the issue of fraud to defeat the judgment unless new evidence can be found.

5.3.3 Issues of jurisdiction

5.3.2.1 Foreign judgment merely on jurisdiction

Traditionally, under English law only a judgment "on the merits" can have an issue preclusion effect in subsequent proceedings.[512] This means that only issues in relation to a substantive claim and established as the legal foundation of the judgment can have an issue preclusion effect in subsequent proceedings.[513] This is also the case for foreign judgments.[514] In *Black-Clawson*,[515] it was held that foreign judgments "on the merits" referred to the merits of the plaintiff's claim, therefore other issues, not "on the merits", have no preclusion effect in subsequent proceedings.

However, as English court practice evolved, the traditional meaning of "on the merits" was challenged since it excludes issues decided "on a separate occasion", and "as a free-standing issue independent from the main substantive proceedings on a claim" from giving rise to issue preclusion, such as issues on procedural, jurisdictional and non-substantive matters.[516] As observed in *Carl Zeiss Stiftung v Rayner & Keeler Ltd*,[517] the requirement of "on the merits", understood as "the merits of the action as stated in the plaintiff's claim", is a "serious obstacle to the efficacy of the estoppel".[518]

In *The Sennar*[519] the approach changed. In this case, the claimant instituted an action before the Dutch courts although the bills of lading contained a Sudanese jurisdiction

510 Ibid.
511 [1995] 1 WLR 44 (PC).
512 *Blair v Curran* 62 CLR 464 (1939) (Dixon J).
513 Ibid.
514 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 (HL).
515 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg A G* [1975] AC 591, in this case, a foreign judgment in which the claim was dismissed as time-barred in Germany was considered not "on the merits", therefore did not bar re-litigation on the same claim before English court based on Section 8 of the Foreign Judgments (Reciprocal Enforcement) Act 1933.
516 Barnett (2001) p.134.
517 [1967] 1 AC 853 (Lord Wilberforce) (HL).
518 [1967] 1 AC 853, 969.
519 *D S V Silo-und Verwaltungsgesellschaft mbH v Owners of The Sennar and 13 Other Ships [On appeal from the Sennar (No. 2)] (The Sennar)* [1985] 1 Lloyd's Rep 521, 527 (HL).

clause. After considering the facts of the case, the Dutch court declined jurisdiction based on the validity of the jurisdiction clause in the bill of lading. Thereafter, the plaintiff sought to institute a new action in the English courts. The defendant tried to have the action dismissed by the English court on the grounds that the Dutch judgment had an issue preclusion effect in respect of the lack of jurisdiction. In challenging the issue preclusion effect, the plaintiff claimed that the Dutch judgment was not "on the merits" and therefore incapable of having an issue preclusion effect.

At the House of Lords, Lord Brandon considered the facts and the limits posed by the requirement of "on the merits" and re-defined its meaning. It was held that a decision "on the merits" means:

> "a decision which establishes certain facts as proved or not in dispute, states what are the relevant principles of law applicable to such facts and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned."[520]

On this basis, the House of Lords held that the Dutch judgment on jurisdiction had an issue preclusion effect before English courts. The new understanding of the requirement of "on the merits" confirms that English courts recognize the issue preclusion effect on jurisdiction issues as decided by a foreign court. It signals further that other procedural, non-substantive issues decided by the foreign court may also have a binding effect.

The Sennar[521] demonstrates the practical importance of recognition of the preclusion effect of foreign judgments on jurisdiction in transnational litigation. In this case, the plaintiff chose to ignore the jurisdiction clause in the bill of lading and repeatedly instituted new actions in different courts regardless of the effect of previous foreign judgments. Therefore, it was a principled and fair outcome that he was estopped from raising the same issue of jurisdiction again and was prevented from benefitting from forum shopping.[522]

5.3.2.2 The effect of the determination on jurisdiction contained in a foreign judgment

Where the jurisdiction of the foreign court meets the requirements of English law, e.g. the jurisdiction is based on a valid jurisdiction agreement, or the defendant has voluntarily submitted to the foreign court's jurisdiction, the jurisdiction of the court of origin cannot be challenged at the stage of recognition of a foreign judgment. If however, the foreign court's jurisdiction does not satisfy the requirements of English law, the foreign court's

520 [1985] 1 Lloyd's Rep 521.
521 [1985] 1 Lloyd's Rep 521.
522 Barnett (2001) p.149.

assumption of jurisdiction is considered not binding. However, there are several situations in-between these two extremes that might also lead to issue preclusion effect on jurisdiction.

a Situation mentioned in statute law

Section 32 1982 Act[523] concerns the situation where a foreign court's jurisdiction contradicts a jurisdiction agreement between the parties. In this scenario, it does not necessarily mean that there is no room to sustain the issue preclusion effect on jurisdiction. Where the three cumulative requirements (a), (b) and (c) of Section 32 (1) 1982 Act are met, recognition of a foreign judgment will undoubtedly be refused. However, where a plaintiff institutes an action before a foreign court despite a jurisdiction agreement for a court in another country, and where the ultimate judgment is favourable to the defendant, the foreign judgment cannot be attacked based on the jurisdiction of the court of origin. It implies that the determination on jurisdiction covered by the foreign judgment is binding and precludes further disputes.

b Situation in case law

Another situation is shown in the case *Desert Loan Sun*.[524] In this case, the plaintiff directly invoked the issue preclusion doctrine and claimed that English courts should prevent the defendant from denying the validity of the foreign jurisdiction to avoid enforcement of the judgment because the issue of jurisdiction had been decided already by the US court.[525]

In the Court of Appeal,[526] Roch LJ viewed that the determination whether the defendant voluntarily submitted to the US jurisdiction should only be decided by the English court based on English rules, and accordingly, no issue preclusion effect on jurisdiction as decided by the American judgment should be sustained. However, Stuart-Smith LJ observed that if the issue on jurisdiction was necessarily decided and is closely related to the foreign

523 Section 32 1982 Act provides, "(1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if—(a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and (b) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and (c) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court. (2) Subsection (1) does not apply where the agreement referred to in paragraph (a) of that subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given. (3) In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2) … "

524 *Desert Loan Sun v Hill* [1996] 2 All ER 847 (CA).

525 Ibid.

526 Ibid.

court, which the defendant has actively challenged, the foreign court's determination on the jurisdiction could have preclusive effect. It was further held that:

> "If it was clear that the Arizona decision necessarily decided this issue as a question of fact against the defendant, then in my opinion there would be an issue estoppel in this case. It is clear that the defendant did his best to challenge the jurisdiction in Arizona, which was the appropriate court in which to contest it. It is not a case, therefore, where a party in foreign proceedings decides either not to contest the question, or only do so half-heartedly because little is at stake …."[527]

It should be also noted that this holding was criticized as it may conflict with Section 33(1)(a) 1982 Act.[528] There it is provided that if a party appeared before the foreign court merely for the purpose of contesting the jurisdiction of the court, the foreign court should not be regarded as having jurisdiction over the defendant. And it follows that, even if a party has already contested the jurisdiction before the foreign court, he can disregard the determination of the foreign court and challenge the jurisdiction of the foreign court at the stage of recognition of foreign judgments.

In my view, it is not proper to use Section 33 1982 Act to deny the effect of *Desert Sun Loan*.[529] In any case, it is the freedom of the defendant to choose to contest the jurisdiction or not. If he indeed appeared before the court and made his contestation, it is not unfair for him to be bound by the result. Nevertheless, it should be admitted that there is an adverse effect of the opinion of the *Desert Sun Loan*. The defendants (probably the judgments debtors) may become increasingly reluctant to appear in foreign proceedings to challenge the foreign court's jurisdiction, especially where they do not have assets in that country in order not to be bound by the foreign decision and reverse their rights of challenge against the jurisdiction of the foreign court at the stage of recognition and enforcement of foreign judgment.

527 *Desert Loan Sun v Hill* [1996] 2 All ER 847 (Stuart-Smith LJ).
528 Briggs (1997) p.597-598.
529 *Desert Loan Sun v Hill* [1996] 2 All ER 847 (CA).

5.4 The US law

5.4.1 Approach decided by the practical needs

Under the US law, the preclusive effect of judgments as to certain issues is normally conceptualized as the notion of collateral estoppel or issue preclusion. In theory American courts could preclude the parties from re-litigating issues that have previously been litigated and decided upon based on the two prevailing approaches. However, in practice the recognition of the issue preclusion effect of foreign judgments, whether based on the law of the court of origin or on the law of the court addressed, is a complicated issue.

At the start, it must be observed that to give issue preclusion effect to foreign judgments has been viewed in a negative light. As the issue preclusion effect is normally put forward in an action concerning a different cause of action, it has been suggested[530] that ordinarily it is much less equitable to hold the prior determination binding upon the parties. Therefore, in cases concerning foreign judgments, it seems unfair for the parties to be precluded from re-litigating the same issues, since they may have had less motive, interests and opportunity to litigate the material issues in the first proceedings, but also may not have foreseen the importance of the prior determination for the subsequent foreign proceedings.[531] It has also been contended that American courts will recognize the issue preclusion effect of foreign judgments only in quite limited situations. These cases basically concern foreign judgments *in rem*,[532] *quasi in rem*,[533] and on status.[534] For the former two types of judgments, both determine only "an interest in", or "the fate of" the specific property.[535] Therefore, the determination as to the specific interests precludes further controversies.[536] For foreign

530 Polasky (1954) p.250.

531 Smit (1962) p.62.

532 *Yeaton v Fry* 9 U S 335(1809): "Copies of the proceedings in the vice admiralty court of Jamaica were admitted in evidence, where they were certified under the seal of the court by the deputy registrar, who was certified by the judge of the court, who was certified by a notary public"; *Williams v Armroyd* 11 U S 423 (1813): "An American cannot reclaim in the courts of this country, property belonging to him which has been seized and condemned in a French court under the Milan decree"; *Maryland Ins Co v Bathusrst* 5 G & J 159 (1833): "Where the sentence of a court of admiralty, condemning a vessel, recited that at the date of the decree the port which such vessel had attempted to enter was blockaded, evidence that at the time of her capture such port was not in fact blockaded is immaterial and irrelevant, in an action on a policy of insurance to recover for a total loss arising from such condemnation".

533 *Quasi in rem* is a legal proceeding based on property of a person who is absent from the jurisdiction.

534 For example, judgments on divorce. In: *Omega Importing Corp v Petri-Kine Camera Co* 451 F 2d 1190 (2nd Cir 1971) the court barred re-litigation as to the status of the corporation that had been determined by the judgment from a West German court.

535 Smit (1962) p.66.

536 Ibid. 70.

judgments about "status", re-litigation should not be allowed, since it would quickly "reach the point of harassment".[537]

In practice, it seems that the approach taken by American courts for the recognition of the issue preclusion effect of foreign judgments, tends to be chosen based on the practical needs of the case. As the US law favours giving issue preclusion effect to domestic judgments, especially under its federal law,[538] it is likely to grant broader issue preclusion effects than most foreign laws. Therefore, parties seeking to benefit from issue preclusion will be inclined to invoke the US law. Where the US law is applicable,[539] courts should be cautious and bear in mind solid considerations of fairness, due process and justice.[540] Since its concept of issue preclusion is broader than others, courts tend to strike a balance between "finality of judgments" and "interests of parties" in deciding whether to give a broad effect to foreign judgments.[541]

Moreover, in some cases courts may skip the choice of law process altogether and directly apply the law of the court addressed.[542] In other situations, American courts seem to prefer foreign law over the law of the court addressed, especially where foreign law provides lesser preclusive effects for foreign judgments than under the US law. It has been claimed that "the more limited the effect of a judgment", the more readily acceptable would be "its recognition as *res judicata*",[543] in cases where parties intend to use foreign law to deny, rather than sustain the preclusive effect before US courts,[544] and where foreign law and US law are identical.[545]

537 Ibid. 65.

538 The most notable characteristic of the American issue preclusion rules regards its abandonment of the requirement of the same parties, starting from the 1950s and firmly confirmed by the Supreme Court in the 1970s, which will be discussed as below.

539 *Omega Importing*, 451 F 2d 1195: "the court applied federal law to confirm the issue preclusion effect of a German judgment without considering German law"; In: *United States Currency in the Amount of $294,600* 1992 WL 170924 federal law was applied to preclude re-litigation of an issue determined by a Canadian court without discussing the choice of law issue; see also Joiner (1986) p.219.

540 McFarland (2010) p.73.

541 Reese (1950) p.784.

542 In: *Omega Importing Corp v Petri-Kine Camera Co* 451 F 2d 1190 federal law was applied to preclude re-litigation of issue determined by a West German court without discussing the choice of law issue. In: *United States Currency in the Amount of $294,600* 1992 WL 170924 federal law was applied to preclude re-litigation of issue determined by a Canadian court without discussing choice of law issue.

543 Smit (1962) p.66.

544 *Palmarito De Cauto Sugar Co v Warner* 232 N Y S 569 (1929)

545 *RA Global Services, Inc v Avicenna Overseas Corp* 843 F Supp 2d 386(2012); *Scheiner v Wallace* 832 F Supp 687 (1993). In: *Fairchild, Arabatzis & Smith, Inc v Prometco (Produce & Metals) Co, Ltd* 470 F Supp 610 (1979) the court found that English and New York courts apply similar notions of collateral estoppel.

5.4.2 *Issues of jurisdiction*

Also under the US law, an important aspect of the recognition of issue preclusion effect of foreign judgment concerns the issue of jurisdiction.

5.4.2.1 Foreign judgments merely on jurisdiction

In the case of a foreign judgment merely on jurisdiction, especially a foreign court's dismissal of the case on the ground of lack of jurisdiction, American courts see no justification to preclude the plaintiff from bringing the claim again. Moreover, American courts may find that the preclusive effect of such foreign judgments should be determined by the law of the court of origin, yet the effect of a foreign judgment merely on jurisdiction is difficult to ascertain. Finally, American courts will in general not foreclose a second action in the United States, irrespective of whether the court of origin dismissed the case.[546]

5.4.2.2 The effect of the determination on jurisdiction contained in a foreign judgment

Within the federation, it has been held by the Supreme Court of the United States that if the defendant appeared in the foreign state court to challenge the jurisdiction of the court, the defendant should be bound by the decision on jurisdiction even though he did not defend the case on its merits.[547] This seems to be true in cases where a foreign country court made a decision on jurisdiction. In *Sprague and Rhodes Commodity Corp*,[548] it was held that if the defendant entered a special appearance before the Mexican court for contesting the jurisdiction, the defendant has no right thereafter to challenge the issue of jurisdiction in order to the deny the foreign judgment. Similarly, in *Fairchild, Arabatzis & Smith*,[549] it was held that, if he defendant has litigated but lost the issue of personal jurisdiction in Britain, he has no right to contest the jurisdiction of that court in a collateral action.[550]

Despite the above, in *CIBC Mellon Trust*,[551] the court held that the determination by an English court that it had personal jurisdiction over two Dutch corporations that appeared solely to contest jurisdiction did not amount to *res judicata* in US courts. The reasons for this are as follows: Firstly, the rule established in *Baldwin* is not applicable to cases concerning foreign judgments; Secondly, if a determination about its jurisdiction by a

546 §3 Comment d, American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006).
547 *Ins Corp of Ireland, Ltd v Compagnie des Bauxites de Guinée* 456 US 694 (1982).
548 *Sprague and Rhodes Commodity Corp v Instituto Mexicano del Cafe* 566 F 2d 861 (2nd Cir 1977).
549 *Fairchild, Arabatzis & Smith, Inc v Prometco (Produce & Metals) Co* 470 F Supp 610, 615 (1979).
550 Ibid.
551 *CIBC Mellon Trust Co v Mora Hotel Corp NV* 743 N Y S 2d 408 (2002).

foreign court precludes the defendant from challenging that jurisdiction in US courts because he has contested in the foreign court, there is a risk that a foreign court's determination "does not necessarily comply with the prerequisites of this country's Constitution for such a finding". Therefore, an assertion of jurisdiction by a foreign court should not preclude re-litigation before a US court, and such re-litigation is not "a second bite of the apple on the jurisdiction issue".[552] Thirdly, as recognition law explicitly provides that an appearance for the purpose of contesting jurisdiction is not a sufficient basis for recognition, the internal logic implies that the determination as to jurisdiction by the foreign court is not "absolutely established as a fact following that appearance and unsuccessful challenge".[553]

In the Proposed Federal Statutes, the drafters have adopted a view half-way between the above two. To be specific, it divides the determination as to the jurisdiction into a question of fact and a question of law. It is proposed that, if the judgment debtor challenged the jurisdiction of the rendering court in the foreign proceeding, only findings of fact pertinent to the determination of jurisdiction of the rendering court are conclusive in US court proceedings. And in any case, the judgment debtor can challenge the jurisdiction of the foreign court at the stage of recognition and enforcement of foreign judgments.[554]

5.5 Requirements for issue preclusion effects

To further clarify how courts in the selected jurisdictions grant issue preclusion effect to foreign judgments, the following part will examine the main requirements for such effect under the laws of the selected jurisdictions as well.

5.5.1 Same issues

5.5.1.1 Brussels Ibis

If the issue preclusion effect is sought based on national laws, it is the national procedural law of the EU member state of the court addressed that determines what constitute the same issues. Alternatively, if the issue preclusion effect is sought merely based on the rules of Brussels Ibis, as discussed above, Brussels Ibis now only recognizes the issue of jurisdiction as subject-matter for the autonomous issue preclusion effect. In this approach,

552 Ibid.

553 Ibid.

554 §4 (b) and Comment c and d, American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006). This view is basically the same as the view in §482 comment c, Restatement (Third) of Foreign Relations Law (1987).

"same issues" can only be issues on jurisdiction, including the jurisdiction of the court of origin and the legal grounds (*ratio decidendi*) underpinning the determination on the jurisdiction.[555] Article 45(2) Brussels Ibis requires that if review of the jurisdiction of the court of origin is allowed, the review is bound by findings of fact on which the court of origin based its jurisdiction. It follows that findings of fact on which the court of origin based its jurisdiction are also the subject-matter of the same issues under Brussels Ibis.

Moreover, it should be noted that, where recognition is sought for the issue of the jurisdiction of the court of origin to preclude further controversies, it is not required that the court of origin has actually litigated the issue. As long as the court of origin established its jurisdiction based on the jurisdiction rules, this finding will not be reviewed. Except for the situations as prescribed in Article 45(1)(e), even if the jurisdiction of the court of origin is unfounded, re-opening of the jurisdiction issue is still not allowed.[556]

5.5.1.2 English law

The determination of the same issues under English law can be divided into two sub-questions. One concerns the scope or range of issues, i.e. the subject matter of issue preclusion; the other concerns how to determine the required identity of the issues.

a The subject matter

Under English law, the subject matter of issue preclusion mainly concerns issues of fact. Issue of fact refers to the legal consequences of certain acts or facts.[557] Issue of fact means both the fact "fundamental to the decision arrived at" in the former proceedings and "the legal quality of the fact".[558] Therefore, an issue of mere fact without legal consequences can also have preclusive effect. In line with this view, it was held in the House of Lords by Lord Reid that it was meaningless to distinguish between "issue estoppel" and "fact estoppel", e.g. to make a distinction between "whether there ever was a ceremony" and "whether the ceremony created a marriage" since the two may have the same preclusive effect at a later stage in respect of the status of the marriage.[559]

However, in some cases, English courts exclude issues of mere fact from the scope of issue preclusion. In *Thoday v Thoday*,[560] it was held that mere findings on the facts of the

555 *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH* (Case C-456/11) ECLI:EU:C:2012:719.

556 *Hupperichs v Dorthu*, Hoge Raad 2 May 1986, ECLI:NL:HR:1986:AB7998, NJ 1987, 481 with comment from van J.C. Schultsz, also see in Francq (2016) p.883.

557 *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 1 Llyod's Rep 223 (CA).

558 *Hoystead v Commissioner of Taxation* [1926] AC 155 ().

559 *Carl Zeiss Stiftung v Rayner & Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 (HL).

560 [1964] 1 All ER 341. In this case, it was held that the allegations that were denied by the previous proceeding in respect of the husband's cruelty did not fall within the scope of "issue estoppel" that could be prevented from further consideration in the subsequent proceeding. ("The determination by a court of competent jurisdiction of the existence or nonexistence of a fact, the existence of which is not of itself a condition the

case were not binding on subsequent proceedings. In *Fiedelitas Shipping*, Diplock LJ followed *Thoday v Thoday* and held that "while an issue may thus involve a dispute about facts, a mere dispute about facts divorced from their legal consequences is not an issue".[561]

Apart from issues of fact, issues of law may also sometimes be raised to seek an issue preclusion effect. English courts refuse to grant preclusive effect to issues of law.[562] One exception concerns a specific form of issues of law, i.e. the interpretation of legal documents or clauses in a contract. It was held that the interpretation of a legal document can only have preclusive effect in situations where two proceedings concern a particular document. Two documents with substantially identical words do not satisfy this requirement.[563] Moreover, if the issue preclusion effect of the interpretation of clauses is raised in situations where the two proceedings concern two different claims, it should also be denied.[564]

b Required qualifications for issues

"Fundamental"

Generally speaking, an issue that "in substance (has) been decided, or has in substance formed the *ratio* of, or been fundamental to, the decision in an earlier action between the same parties" is estopped from further litigation.[565] Issues of law or fact that are subsidiary or collateral only are not subject to issue preclusion.[566] E.g., if an issue only supports the proposition of the claimant regarding his legal right, it cannot be considered as an issue with preclusive effect.[567]

In *Kirin-Amgen*,[568] the court held that the issue preclusion effect of foreign judgments should be confined to "fundamental" and not "collateral or obiter" issues.[569] It is not fair to prevent the parties from litigating those insignificant issues in foreign proceedings and

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fulfilment of which is necessary to the cause of action which is being litigated before that court, but which is only relevant to proving the fulfilment of such a condition, does not estop at any rate per rem judicatam either party in subsequent litigation from asserting the existence or non-existence of the same fact contrary to the determination of the first court. It may not always be easy to draw the line between facts which give rise to "issue estoppel" and those which do not, but the distinction is important and must be borne in mind.")

561 *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 1 Lloyd's Rep 223.

562 Ibid. 645.

563 *New Brunswick Rly Co v British & French Trust Corp Ltd* [1939] AC 1 (HL).

564 *Blair v Curran* 62 CLR 464 (1939).

565 *New Brunswick Rly Co v British & French Trust Corp Ltd* [1939] AC 1(HL), 43.

566 *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 (Lord Upjohn), it was held that "it is a matter which would seem … to be a matter collateral and incidentally cognizable and therefore not the subject of estoppel".

567 *Blair v Curran* (1939) 62 CLR 464, HCA; *Penn-Texas Corporation v Murat Anstalt (No. 2)* [1964] 2 QB 647, 660 (CA).

568 *Kirin-Amgen Inc v Boehringer Mannheim GmbH* [1997] FSR 289 (CA).

569 Ibid.

those that are difficult, impossible or expensive to argue abroad before English court.[570] Besides, it is also held by the House of Lords that it might not be easy to decide that "a particular issue or resolution was the basis of the foreign judgment and not merely collateral or obiter".[571]

"Not actually decided"?

Traditionally, issue preclusion under English law does not require issues to have been actually decided in the first proceedings. This means that implicity resolved issues can be the subject of issue preclusion. It has been held that, "it is not necessary…that there should be an express finding in terms".[572] It follows that issues "of assumption or admission" insofar as fundamental to the decision can be the subject matter of issue preclusion.[573] Furthermore, issues that should have been raised in the first proceedings with reasonable diligence, can be excluded from re-litigation. In *Fidelitas Shipping*,[574] an English court held that:

> "each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even by accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings".[575]

This actually echoes the *Henderson* case,[576] in which the English court held that issues that have not been decided might also be prevented from re-litigation in subsequent proceedings.[577]

However, as for foreign judgments, the application of the *Henderson* rule to extend the scope of issue preclusion is doubted. In *Carl Zeiss (No.2)*,[578] the House of Lords held that the *Henderson* rule may not be applied to issue preclusion since it was initially created for cause of action estoppel (i.e. the rule for precluding re-litigation for contradictory

570 Ibid.
571 Ibid.
572 *Shoe Machinery Co v Cutlan* [1896] 1 Ch 667.
573 *Hoystead v Commissioner of Taxation* [1926] AC 155, 170, see also in *New Brunswick Rly Co v British & French Trust Corp Ltd* [1939] AC 1 (HL), 28.
574 *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 1 Lloyd's Rep 223.
575 Ibid.
576 (1843) 3 Hare 100.
577 Ibid.
578 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853.

results).[579] It has also been suggested that the *Henderson* rule cannot be used to extend the scope of issue preclusion as there was no case law showing that this rule could also apply to the questions of fact or law that were not fundamental to the earlier decision.[580]

Moreover, it was held that there are many practical reasons that should be taken into consideration before unraised issues are included as being the subject matter of issue preclusion. E.g., whether these unraised issues may cost too much to litigate in the foreign country and whether it is predictable for the parties to invoke the preclusive effect of these unraised issues in a second action on a different cause of action.[581] Therefore, it is unjust to give preclusive effect to these unraised issues before English courts.[582] In line with the above views, in *Naraji v Shelbourne*,[583] the defendant sought the preclusive effect as to the issue of the standard of care. The English court formally rejected the defendant's plea since it was not clear whether the foreign dismissal judgment had actually litigated that issue.

c Identity of issues

The determination of whether issues raised in the second proceedings are identical with those in the first, is less often disputed. Identity of the issues depends on "whether the facts, circumstances and arguments would be the same".[584] Where the case concerns a foreign judgment, the difference in laws applied by the courts of different countries does not affect the identity of issues.[585] However, in *Yukos Capital Sarl v OJSC Rosneft Oil Co*,[586] the Court of Appeal refused preclusive effect as to the issue of the partiality and dependence of Russian courts determined by the Dutch court. The reason is, that Dutch public policy and English public policy are different, so that the issue was not the same.

5.5.1.3 The US law

From the above, it can be found that although American courts may refer to foreign laws, this will not stop them from determining the issue preclusion of foreign judgments,[587]

579 Ibid. It was held that "some confusion has been introduced by applying to issue estoppel without modification rules which have been evolved to deal with cause of action estoppel, such as the oft-quoted passage from the judgment of Wigram V-C in *Henderson v Henderson*."
580 Hardley (1997).
581 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 (Lord Reid and Lord Upjohn) (HL).
582 Ibid. 947 (Lord Upjohn).
583 [2011] EWHC 3298.
584 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853, 947 (Lord Upjohn); *Desert Sun Loan Corp v Hill* [1996] CLC 1132.
585 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853, 913 (Lord Upjohn).
586 [2011] 2 Lloyd's Rep 443.
587 Casad (1984) p.72.

especially where foreign law cannot be proven,[588] or where foreign law and the US law have similar rules on issue preclusion.[589]

a The subject matter

Under the US law, the subject matter of issue preclusion mainly concerns issues of fact, including "ultimate facts" (issues of law applied to facts) and "mediate datum" (evidentiary facts).[590] "Ultimate facts" mean those facts "upon whose combined occurrence the law raises the duty, or the right, in question", or those that "the law makes the occasion for imposing its sanctions".[591] The "mediate datum" means those facts "from whose existence may be rationally inferred the existence of one of the facts upon whose combined occurrence the law raises the duty, or the right".

Initially, American courts only considered "ultimate facts" as the subject matter of issue preclusion. In *The Evergreens v Nunan*,[592] it was held that there was no need to make a distinction between "ultimate facts" and "mediate datum". Instead, the court raised several requirements to determine the subject matter of issue preclusion. It should satisfy the following requirements. First, whether the facts have actually been litigated, including both the ultimate facts and the mediate datum. Second, whether the parties have tried their best efforts to litigate the facts. Third, whether the parties can reasonably predict the consequences of those facts that are considered as conclusive.[593]

Parties have occasionally suggested that issues of law can also be the subject matter of issue preclusion. Issues of law mean issues that concern "abstract rulings of law, unmixed with any particular set of facts".[594] There are many cases in which it was explicitly denied that issues of pure law are the subject matter of issue preclusion. This is because the generally held view is that issue preclusion only concerns determinations of fact or determinations of mixed fact and law.[595] There are additional reasons to deny that issues of law are the subject matter of issue preclusion. First, issues of law should not be preclusive since this might "delay desirable growth of legal principles".[596] Besides, some maintain that the reassertion of issues of law is less burdensome than reopening issues of fact.[597] Moreover,

588 *Ventas, Inc v HCP, Inc* 647 F 3d 291, 303 (6th Cir. 2011).
589 *In re Zietz' Estate* 135 N Y S 2d 573 (1954); *Fairchild, Arabatzis & Smith,* 470 F Supp 610, 616–17 (1979).
590 §27 Comment j, Restatement (Second) of Judgments (1982).
591 *Southern Pac R Co v US* 168 US 1 (1897).
592 141 F 2d 927 (2nd Cir 1944).
593 Ibid.
594 Wright, Miller and Cooper (2002) § 4425.
595 *Yates v US* 354 U S 298 (1957).
596 Wright, Miller and Cooper (2002) § 4425.
597 Ibid.

there is a view suggesting that it is manifestly unjust to apply one rule of law between the same parties when different rules are applied to all other persons.[598]

Nonetheless, both state courts and federal courts have granted to issues of law certain preclusive effects.[599] E.g. in the *U.S. v Moser* case,[600] the US Supreme Court has held that "a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law."[601] Notably, the preclusive effect as to issues of law is normally sustained in situations concerning continuing facts or closed facts and continuing new liabilities.[602] For example, cases concerning on-going tax liabilities of taxpayers,[603] or annual payments for veterans.[604] Moreover, the preclusive effect as to the issues of law is not sustained by American courts in cases where there is a change in legal climate,[605] or where an equitable administration of law is required.[606]

Based on *Hilton v Guyot*,[607] it seems that the US Supreme Court also recognizes the preclusion effect of issues of law in cases concerning foreign judgments.

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598 Buckley (1987) ff.875; Scott (1942) p.7, see also *City of Los Angeles v City of San Fernando* 14 Cal 3d 199 (1975): "holding one group bound to a rule when others are not inherently unjust".

599 *Tait v Western* 289 U S 620 (1933); *United States v Moser* 266 US 26 (1924), see also in Wright, Miller and Cooper (2002) § 4425 and §27 and §28 Restatement (Second) of Judgments (1982): "when an issue of fact or law is actually litigated and determined by a valid and final judgment … the determination is conclusive in a subsequent action between the parties … " As for the state practice, *Morris v Union Oil Co* 421 N E 2d 278 (1981): " 'Collateral estoppel' … stands for doctrine which forecloses re-litigation of particular issues of either fact or law that are logically and legally necessary in reaching prior judgment where such issues are again raised by at least one of parties to prior suit"; *City of Columbus v Union Cemetery Ass'n* 341 N E 2d 298 (1976): "In absence of fraud or collusion, a point of law or a fact which was actually indirectly in issue in a former action, and was there passed upon and determined by a court of competent jurisdiction, may not be drawn in question in a subsequent action between same parties or their privies".

600 266 US 236 (1924).

601 Ibid.

602 Wright, Miller and Cooper (2002) § 4425.

603 *Commissioner of Internal Revenue v Sunnen* 333 US 591 (1948).

604 *National Organization of Veterans' Advocates, Inc v Secretary of Veterans Affairs* 260 F 3d 1365 (2001).

605 *Commissioner of Internal Revenue v Sunnen* 333 US 591 (1948); *Commissioner of Internal Revenue v Sunnen* 333 US 591 (1948). see also in § 28 Restatement (Second) of Judgments (1982). The change of legal climate does not mean to re-argue the legal rules applied in the previous action, but rather, it is "a change or development in the controlling legal principles" that may make the prior application of law entirely "obsolete or erroneous, at least for future purposes", and "inequity can result as readily from neglecting legal modulations".

606 § 28 Restatement (Second) of Judgments (1982).

607 159 US 113 (1895): "where a valid judgment had been rendered by a court in a foreign country and the merits of the case should not be tried afresh upon the mere assertion of a party that the judgment was erroneous in law or in fact".

b Required qualifications for issues

"Actually litigated"

Under the US law, issues subject to preclusion should have been "actually litigated" between the parties in the previous proceedings.[608] It has been suggested[609] that the introduction of the requirement of "actually litigated" is premised on the realization that parties may fail to raise an issue for various reasons, such as, considerations on the costs of litigation and the convenience of the court to litigate. If the preclusive effect were to be given to issues that had not actually been litigated, parties would feel too discouraged to compromise. Also, this will not help to reduce the amount of litigation.[610] It has further been suggested that to exclude issues not litigated from having preclusive effects would not cause too much additional expense and vexation.[611]

"Actually decided" and "essential"

The other required qualification is that issues should be "actually decided". This requirement is normally accompanied by the additional qualifier of "essential to the judgment".[612] This qualifier purports to guarantee that the first court has taken sufficient care to determine the issues that can affect the result of the proceedings, and that the parties have contested the issues fully.[613]

c Identity of issues

Under the US law, identity of issues means that not only the facts but also the legal rules applied to the facts are identical.[614] Therefore, either a difference in the facts or a difference in the legal rules can prevent the issues from being identical. In terms of the identity of facts, it is stated that where the facts involved in the two actions arise from events that took

608 § 27 Restatement (Second) of Judgments (1982).

609 Polasky (1954) p.226.

610 § 27 Comment e, Restatement (Second) of Judgments (1982).

611 Polasky (1954) p.226: "Implicit in the requirement of actual litigation is the recognition that a defendant may for various reasons fail to raise a defence or to litigate an issue thoroughly where the amount at stake does not seem to justify the expense and vexation of a maximum defence effort.". Conversely, it has also been suggested that judges should also give issues that are admitted by the parties preclusive effect to the same extent as issues that are actually litigated. And this will contribute to future compromise in the following actions. Moreover, in some cases, judgments on consent or default judgments are also held to have issue preclusion effect, see in Polasky (1954). However, it has been suggested that 'these cases' approach is not only unfair and inefficient, but also fictional in treating as established many matters that were never decided. Although a default or consent judgment can have claim preclusion effect, it should not generate issue preclusion", see in Clermont (2016) p.1118.

612 *Mother's Restaurant, Inc v Mama's Pizza, Inc* 723 F 2d 1566 (1983).

613 *US v Weems* 49 F 3d 528 (9th Cir 1995): "The primary purpose of the requirement that a finding be necessary to support the earlier judgment is to ensure that sufficient care was taken in making the findings.", see also in Wright, Miller and Cooper (2002) § 4421.

614 *Southern Pacific Transp Co v Smith Material Corp,* 616 F 2d 111 (5th Cir 1980); *Brister v A W I, Inc* 946 F 2d 354 (5th Cir 1991): "finding of privity or knowledge of unseaworthiness in a limitation proceeding may in some circumstances estop a jury from deciding the issue of negligence in the Jones Act trial".

place at different times, there is no identity of facts.[615] Moreover, where there are substantial overlaps between the events, identity of facts may be sustained.[616] In terms of the identity of legal rules, identity is lost if the law is changed.[617] Where there are substantial changes in the legal climate that suggest a new understanding of the governing legal rules that may require a different application, the legal rules are no longer identical.[618]

Finally, identity of legal rules does not mean that identical rules should be applied to the matters at issue. It only requires that the same general legal rule governs both cases.[619] Notably, in cases involving foreign judgments, foreign law inevitably diverges from the law of the court addressed. In *Leo Feist*,[620] it was held that,

> "The English court found as a fact that there was neither conscious nor subconscious copying. In making this finding the English court applied legal principles which, if different at all, are only very slightly different from those which would be applied in an American court. Unless the plaintiff can contest that fact finding in this court, the defendants must prevail here since without proof of copying, it cannot recover under the law of the United States."

From the above, it can be found that the difference between foreign law and the law of the forum does not necessarily lead to a lack of the identity of legal rules required by issue preclusion.

5.5.2 Same parties

5.5.2.1 Brussels Ibis

If the issue preclusion effect is sought based on national laws, it is the national laws that determine the meaning of the same parties. If the issue preclusion effect is sought merely based on the rules of Brussels Ibis, the requirement of the same parties for the autonomous claim preclusion effect under Brussels Ibis can be employed here.[621] Nevertheless, it can

615 Wright, Miller and Cooper (2002) § 4425. Notably, this is especially the case where two actions concern different causes of action.

616 Ibid. For example, the second event took place immediately after the first event.

617 *United Services Auto Ass'n v Perry* 102 F 3d 144 (5th Cir 1996): "the statute was amended leads to the lack of identity of legal standard".

618 *Commissioner of Internal Revenue v Sunnen* 333 US 591(1948); see also Charles Alan Wright et al (2002), § 4425. A legal climate change means that if the rule of issue preclusion applies, e.g. it would "impose on one of the parties a significant disadvantage, or confer on him a significant benefit, with respect to his competitors", see also in § 28 Comment c, Restatement (Second) of Judgments (1982).

619 Wright, Miller and Cooper (2002) § 4425.

620 Leo Feist, Inc v Debmar Pub Co 232 F Supp 623 (1964).

621 See Chapter 4 Section 4.2.

be assumed that invoking the preclusion effect as to issues of jurisdiction is not necessarily restricted to proceedings between the same parties. Specifically, if a court of an EU member state renders a judgment, the determination on the issue of jurisdiction, including those issues underpinning this determination and the facts relied upon, should be recognized by courts of every member state.

5.5.2.2 English law

English law also requires the same parties in cases concerning issue preclusion. The meaning of this requirement, is basically the same as that of claim preclusion.[622] However, unlike claim preclusion cases, it can be found that in cases concerning issue preclusion this requirement can sometimes be relaxed. Therefore, this section will only examine whether the requirement of the same parties is indispensable in cases of issue preclusion.

a The negative view

In *Gleeson v J Wippell & Co Ltd*,[623] the defendant sought issue preclusion based on a previous judgment between the plaintiff and another unrelated party in respect of copyright. The plaintiff lost the previous action and instituted the new action against the defendant claiming breach of the same copyright. Although the defendant was unrelated to the previous one, he intended to use the issue preclusion effect of the previous judgment against the plaintiff to argue that he and the previously successful defendant were in "privity of interests". However, the court held that,

> "I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was a party should be binding in proceedings to which the other is a party. It is in that sense that I would regard the phrase 'privity of interest'."[624]

In this case, the English court explicitly denied the issue preclusion effect against a non-party or raised by a non-party against the previous parties. It was held that a non-party should

622 See Chapter 4 Section 4.3.
623 [1977] 1 WLR 510.
624 [1977] 1 WLR 510.

not be precluded from having his chance to defend unless "his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him". Moreover, if issue preclusion is allowed to be used against a non-party, a plaintiff might "select the frailest of a number of possible defendants, and then use the victory against" those who are not the parties in the previous proceeding.[625] The other way around, a non-party could not deny his liability by using a previous judgment reached in a proceeding to which he is not a party.[626]

b The positive view

Despite the above, there is also evidence showing that English courts allow a departure from the same parties requirement. In *Hunter v Chief Constable of the West Midlands*,[627] in the prior trial, the court held that the defendant, i.e. the police, had not assaulted the plaintiff. After that, the plaintiff raised the issue of assault against another police department for damages based on the same allegations.

In order to seek the issue preclusion effect of the previous judgment, the defendant argued that, as the issue concerns "status and other relationships which may infringe on inter-party relationships", the limitation on the identity of parties might not always be appropriate.[628] Furthermore, issue preclusion is based on the principle of fairness, therefore, the requirement of identity of parties should be held unnecessary where such requirement produces unfairness and injustice.[629] Moreover, it was contended that the requirement of the same parties might bring about more litigation and conflicting judgments.[630] In the end, the Court of Appeal gave judgment for the defendant. It was held that the plaintiff was estopped from re-litigating the same issue despite a lack of identity between the parties.

In *North West Water Authority v Binnie*,[631] the issue of abandoning the same parties requirement was raised again. In the previous suit, the plaintiff claimed for compensation

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625 It was held that, "a defendant ought to be able to put his own defence in his own way, and to call his own evidence. He ought not to be concluded by the failure of the defence and evidence adduced by another defendant in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him."

626 The court noted that "a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation.", nonetheless, "this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party." Moreover, it was held that "for privity with a party to the proceedings to take effect, it must take effect whether that party wins or loses".

627 [1980] QB 283 (CA), 318.

628 Ibid.

629 Ibid.

630 Ibid. 295.

631 [1990] 3 All E R 547 (QB).

for personal injuries against the Water Authority and Binnie and others, and the court held Binnie wholly liable. On the basis of this, the Water Authority instituted a second action claiming for property damage against Binnie. Binnie sought to re-litigate the issue of liability against the Water Authority. However, the court denied Binnie's claim and held that the issue of liability should be precluded from re-litigation since "different parties will be estopped from re-litigating the same issues arising out of the same facts, already the subject of a decision by a competent tribunal".

It follows from case law that, in order to justify the abandonment of the same parties requirement, English courts may also invoke the doctrine of abuse of process as a supplementary basis. For example, in *Hunter v Chief Constable of the West Midlands*,[632] the House of Lords held that the doctrine of abuse of process required to preclude a party from re-litigating the same issues between two parties who were not identical to the previous proceedings. In *Iberian UK Ltd v BPB Industries Plc*,[633] a non-party plaintiff was allowed to use the issues decided in a previous judgment against the previous defendant on the basis of the doctrine of abuse of process.[634]

5.5.2.3 The US law

Traditionally, issue preclusion takes place between the same parties regardless of the identity of the cause of action. However, under the US law, the requirement of the same parties is fading.[635] The non-mutuality rule is now widely accepted by both federal law and many state laws.[636]

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632 [1982] AC 529 (HL).

633 [1997] ICR 164.

634 Ibid. The defendant was found to have abused their dominant position in the UK plasterboard market. Therefore, the plaintiff claimed damages against the defendant and argued that the defendant was estopped from re-litigating the issue of his abuse. The court confirmed that the defendant should be estopped as to the issues on the basis of abuse of process.

635 *Liberty Mutual Insur Co v George Colon & Co* 260 N Y 305 (1932): "the general rule is that the estoppel of a judgment must be mutual, and, since the judgment is binding only upon the parties to the action, no stranger to the action may assert an estoppel by judgment against a party to the action. There are some well-established exceptions to that rule which are difficult to classify"; *Eagle, Star and British Dominion Insurance Co v Heller* 149 Va 82 (1927): " … generally the benefit of the rule is mutual; and one who is not a party to the cause, and would not be bound by the verdict, if against him, cannot avail himself of it. One of the exceptions to the rule is that where the matter in dispute is a question of public right, in that case, all persons standing in the same situation as the parties are affected by it ..."; *Jenkins v Atlantic Coast Line R Co* 89 S C 408 (1911): "there is no such privity between them as is necessary for the application of that doctrine; but that in such cases, on grounds of public policy, the principle of estoppel should be expanded, so as to embrace within the estoppel of a judgment persons who are not, strictly speaking, either parties or privies. It is rested upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity."

636 *Allen v McCurry* 449 US 90 (1980): " … the Court has eliminated the requirement of mutuality in applying collateral estoppel … "; *Philips Morris Capital Corp v Century Power Corp* 788 F Supp 794 (1982): "federal courts, and most state courts, have abandoned the requirement of mutuality."). However, there are still

a Abandonment of the requirement of the same parties

As early as 1843, the requirement of the same parties has been questioned, it was viewed that,

> "there is reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party; but there is no reason whatever for saying that he shall not lose his cause in consequence of the verdict in a proceeding to which he was a party, merely because his adversary was not. It is right enough that a verdict obtained by A against B should not bar the claim of a third party C; but that it should not be evidence in favour of C against B, seems the very height of absurdity."[637]

In *Bernhard*,[638] Justice Traynor decided to abandon the requirement of the same parties, and the only requirement in respect of the parties is that the party against whom issue preclusion is asserted should be a party to the previous proceedings.[639] Influenced by *Bernhard*, more and more courts started to deny the requirement of the same parties, especially lower federal courts and some state courts.[640] In 1950 e.g., in *Bruszewski v United States*,[641] a longshoreman was injured on a vessel, and claimed that the company servicing the ship had been negligent and that the ship was unseaworthy. The court denied the longshoreman's claim. Later, the longshoreman instituted a new action against a new defendant, the shipowner of the servicing ship, which was the United States. In the second action, the Federal Courts of Appeal, Third Circuit allowed the defendant shipowner to invoke the issue preclusion effect against the longshoreman. It was held that the plaintiff should not be permitted to go to the court a second time after having had a full and fair opportunity to litigate and having lost the claim in the first action unless "overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case".[642]

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state laws still hold the mutuality rule for issue estoppel, such as Virginia law, see in *Weinberger v Tucker* 510 F 3d 486 (4th Cir 2007); Florida law, see in *Far Out Productions, Inc v Oskar* 247 F 3d 986 (9th Cir 2001); Michigan law, see in *Perez v Aetna Life Ins Co* 150 F 3d 550 (1998) and so on. § 27 Restatement (Second) of Judgments (1982) provides, "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

637 Bowring (ed), *7 Bentham's Works* 171(1843).

638 *Bernhard v Bank of America National Trust & Savings Association* 19 Cal 2d 807 (1942).

639 Ibid, it was held that "the requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided".

640 181 F 2d 419 (3rd Cir 1950); *Adriaanse v United States* 184 F 2d 968 (2nd Cir 1950).

641 181 F 2d 419 (3rd Cir 1950).

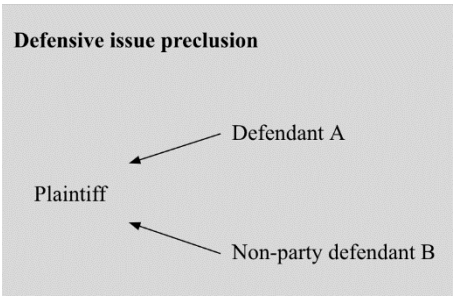
642 Ibid.

In *Blonder-Tongue*,[643] the issue of abandonment of the requirement of the same parties came before the US Supreme Court. In this case, the deliberations in *Bernhard* as well as the scholarly views were considered. The US Supreme Court allowed the abandonment of the mutuality rule and sustained the issue preclusion effect against a different defendant by the same plaintiff. Based on the US Supreme Court's holding, the abandonment of the requirement of the same parties has become a prevailing trend in the federal courts.[644]

b Doubts as to the abandonment

Despite the courts continuous denial of the requirement of the same parties in cases involving issue preclusion, there remain many doubts as to the rejection of the requirement of the same parties. These doubts were initially raised on the basis of a division between two different ways of applying issue preclusion. One is called defensive issue preclusion, the other is offensive issue preclusion.[645] Specifically, defensive issue preclusion means that a new defendant invoked the judgment to estop repeated litigation of an issue decided by the previous judgment against the previous plaintiff or defendant. Offensive issue preclusion means that a new plaintiff invokes the judgment to estop repeated litigation of an issue decided by the previous judgment against a prior defendant or plaintiff.

Figure 2 Defensive issue preclusion

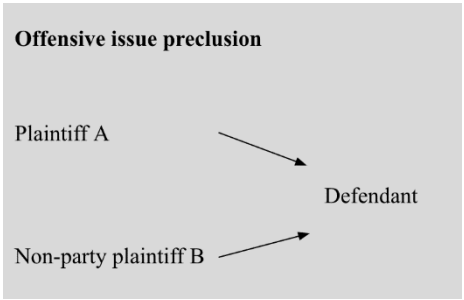


643 Blonder-Tongue Laboratories, Inc v University of Illinois Foundation 402 U S 313 (1971).

644 *McLaughlin v Bradlee* 803 F 2d 1197 (1986): "it has come to be widely accepted that usually little good and much harm can come from allowing a determined plaintiff to retry the same issues in exhausting fashion against successive defendant"; *Allen v McCurry* 449 US 90 (1980): "the court has eliminated the requirement of mutuality in applying collateral estoppel to bar relitigation of issues decided earlier in federal suits". As for case law from states courts after *Blonder-Toungue* case, see in *Thomas M McInnis & Assocs, Inc v Hall* 349 S E 2d 552 (1986): "despite absence of mutuality of estoppel, wife, who was party to auction contract, but not party to original breach of contract action brought against her husband by auctioneer, could assert collateral estoppel to subsequent action brought against her for breach of auction contract."; *Fisher v Jones* 844 S W 2d 954 (1993): "we have no hesitancy in holding that mutuality of parties or privity in the chancery case and its appeal is not required for the defensive use of collateral estoppel in the circuit court case."

645 Currie (1957) p. 308.

Figure 3 Offensive issue preclusion



The defensive use of issue preclusion, does not give rise to many doubts. The rationale seems to be, firstly, that defensive issue preclusion is basically sought against the plaintiff of the previous action by a different defendant. In this case, the plaintiff has taken the initiative to institute the initial action. Therefore, it is unlikely that the plaintiff had no full and fair opportunity to litigate.[646] Secondly, if a different defendant cannot use issue preclusion as a defence against the same plaintiff, it means that this plaintiff can repeatedly litigate the same issues by suing a different defendant.[647]

In contrast, not to require mutuality in the case of the offensive use of issue preclusion, is problematic. It has been argued that where issue preclusion is asserted offensively against a previous defendant, this defendant may not have had a full and fair opportunity to litigate the issue effectively.[648] This is because in the previous proceeding the defendant may have lacked control and initiative and may have faced many obstacles in the court chosen by his opponent.[649] Moreover, where issue preclusion is applied offensively without limitation to the same parties, it might cause a situation of "multiple claimants against a sole defendant". It has been argued that:

> "if the first or any number of plaintiffs sued and lost, the defendant could take no advantage therefrom against other plaintiffs who had had no day in court, whereas whenever any plaintiff should win, all common questions of law and fact would be conclusively determined against the defendant in favour of all other plaintiffs whose rights of action were yet untried".[650]

646 As it was contended by Currie, "he selects his opponent, chooses the time and place of combat, and strikes.", see in Currie (1957) p. 300, see also in case *Coca-Cola Co v Pepsi-Cola* 36 Del 124 (1934).
647 *Coca-Cola Co v Pepsi-Cola* 36 Del 124 (1934), this case has been strongly relied on in the *Bernhard* case.
648 Currie (1957) p. 308.
649 Ibid.
650 Currie (1957), this situation is dubbed as "multiple-claimant anomaly" in the article.

c Setting limits for the non-mutuality rule[651]

The abovementioned problems have not hindered the development of the non-mutuality rule. Following *Blonder-Tongue*,[652] the non-mutuality rule has been widely accepted by federal courts. In 1979, in *Parklane*,[653] the limits of the non-mutuality rule were systematically addressed by the US Supreme Court.

Firstly, a limit should be set for the claimant (usually the plaintiff), especially where a non-party claimant wants to invoke the issue preclusion against a defendant. The court should consider whether the claimant who could easily have joined in the earlier action took a "wait and see" attitude to the previous proceeding to take advantage of the resulting judgment if favourable and to not be bound by the judgment if it was in favour of the defendant.[654]

Secondly, a limit should be set to guarantee that parties have full and fair opportunities to litigate,[655] in particular, whether the defendant has "every motive to make as vigorous and effective a defence as possible".[656] This means that where issue preclusion is invoked against a party, especially the previous defendant, he should be able to foresee that in subsequent proceedings the issue preclusion defence can be raised against him. This not only ensures that the defendant has an incentive to defend himself vigorously in the first action, but also helps to avoid situations where multiple claimants adopt the technique of a "test suit" in order to make use of a favourable result against the defendant.

Moreover, it is important to identify whether the defendant has any "procedural opportunities" unavailable in the first proceedings but available in a later one that would cause a different result. E.g., whether the defendant has the right to select a court, has the

651 The non-mutuality rule is particularly troublesome in cases concerning non-party claimants use the issue preclusion against the prior defendant, see in § 29 Comment e, Restatement (Second) of Judgments (1982), it is stated that, "a person in such a position that he might ordinarily have been expected to join as plaintiff in the first action, but who did not do so, may be refused the benefits of "offensive" issue preclusion … Such a refusal may be appropriate where the person could reasonably have been expected to intervene in the prior action, and ordinarily is appropriate where he withdrew from an action to which he had been a party". In cases where non-party defendants use the issue preclusion against the prior plaintiff, there is no much debate.

652 *Blonder-Tongue Laboratories, Inc v University of Illinois Foundation* 402 US 313 (1971).

653 *Parklane Hosiery Co, Inc v Shore* 439 US 322 (1979).

654 Ibid.

655 In *Blonder-Tongue* 402 US 313 (1971), it was held that the requirement of identity of the parties can be replaced by "the safeguard of requiring that the estopped party have a full and fair opportunity to litigate".

656 *Teitelbaum Furs, Inc v Dominion Ins Co* 58 Cal 2d 601 (1962): "although plaintiffs' president did not have the initiative in his criminal trial, he was afforded a full opportunity to litigate the issue of his guilt with all the safeguards afforded the criminal defendant, and since he was charged with felonies punishable in the state, he had every motive to make as vigorous and effective a defence as possible. Under these circumstances".

chance of a jury trial,[657] has opportunities to require Discovery, bring counterclaims, different representation or present new evidence and witnesses.[658]

5.5.3 Other considerations

Even when the above mentioned requirements are all satisfied, foreign judgments might not necessarily have an issue preclusion effect. There are additional considerations shown in the English and American practice.

5.5.3.1 English law

Under English law, the effect of issue preclusion is not absolute, and can be defeated in special circumstances.[659] What constitute special circumstances is undoubtedly a matter of fact. In *Fidelitas Shipping*,[660] the court held that further evidence could be adduced to show the wrong determination of certain issues when "fresh evidence … could not have been available at the original hearing of the issue even if the party seeking to adduce it had exercised due diligence".[661] Consistently, in *Mills v Cooper*,[662] the court emphasized that the special circumstances exception applies to cases where certain issues have been raised but were found to be incorrectly started and where "further material (is presented) which is relevant to the correctness or incorrectness of the assertion and could not have been adduced by reasonable diligence".[663] More specifically, in *Hunter v Chief Constable of the West Midlands Police*,[664] the court affirmed that the standard for fresh evidence to override an issue preclusion was whether such a fact could "entirely change the aspect of the case" and whether "it was not, and could not by reasonable diligence" have been raised in the first action.[665]

Furthermore, the special circumstances exception sometimes concerns matters of law, particularly a change of law. In *Arnold*,[666] the court held that "the yardstick of whether issue preclusion should be held to apply is the justice to the parties, injustice can flow as

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657 *Parklane Hosiery Co, Inc v Shore* 439 US 322 (1979); § 29 Comment d, Restatement (Second) of Judgments, (1982).

658 *US v United Air Lines, Inc* 216 F Supp 709 (1962).

659 *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 1 Lloyd's Rep 223; *Baltic Shipping Co v Owners of Cargo on the Mekhanik Evgrafov (The Mekhanik Evgrafov and The Ivan Derbenev)* [1988] 1 Lloyd's Rep 330; *Arnold and Others v National Westminster Bank Plc* [1991] 2 AC 93 (HL).

660 Fidelitas Shipping Co Ltd v V/O Exportchleb [1965] 1 Lloyd's Rep 223 (CA).

661 [1965] 1 Lloyd's Rep 223 (CA).

662 [1967] 2 QB 459 (1967).

663 Ibid.

664 [1982] AC 529 (HL), 545.

665 Ibid, citing *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801 (HL).

666 *Arnold and Others v National Westminster Bank Plc* [1989] Ch 63.

much from a subsequent change in the law as from the subsequent discovery of new facts".[667] In this case, change in the law refers to a new construction of the rental contract. Moreover, in a continuous contractual relationship, severely disadvantageous and unfair consequences of a previous judgment are sufficient grounds to justify a new elucidation of the rental contract, which can be considered as a special circumstance that may re-open a decided issue.[668]

Moreover, certain practical reasons may be considered special circumstances by English courts. As held in Carl Zeiss Stiftung v Rayner & Keeler Ltd,[669] the first case may have been of trifling importance but may have involved facts which would be expensive and troublesome for a party to prove. If he could not foresee that the same point might arise again if his opponent later raised a much more important claim.[670] Consistently, in *Kirin-Amgen* case,[671] it was held not fair to preclude the parties from litigating insignificant issues in foreign proceedings and to allow those issues that are difficult, impossible, or expensive to argue abroad, to be brought before English courts.[672]

5.5.3.2 The US law

Under the US law, apart from the above-mentioned requirements and limits, such as the foreseeability of the issues to be precluded and the party's full and fair opportunity to litigate,[673] there are other factors which might influence a court's grant of issue preclusion. First, whether the party against whom issue preclusion is sought has obtained any chance of review of the judgment in the initial judgment, such as appeal to a higher court. If the review was unavailable to this party because he obtained a favourable judgment but lost on the issue, issue preclusion should not be sustained.[674] Second, whether the party against whom issue preclusion is sought had a significantly heavier burden of proof with respect to the issue in the initial action than in the subsequent action.[675] Third, whether determination of the issue would have an adverse impact on the public interest or the interests of other persons not joining the suit.[676]

667 Ibid. 70.
668 *Arnold and Others v National Westminster Bank Plc* [1990] Ch 573 (CA).
669 [1967] 1 AC 853 (HL).
670 Ibid.
671 *Amgen-Kirin Inc v Boehringer Mannheim GmbH* [1997] FSR 289.
672 Ibid.
673 § 28(5) (b)(c) and Comment i, Restatement (Second) of Judgments (1982). it should be also noted that if parties should be bound by those issues unforeseeable at the time of first proceeding, parties will behave more vigorously to litigate issues and accordingly the number of appeals might also increase, see in Polasky (1954).
674 § 28 (1) and Comment a, Restatement (Second) of Judgments (1982).
675 § 28 (4) and Comment f, Restatement (Second) of Judgments (1982).
676 § 28 (5) (a) and Comment h, Restatement (Second) of Judgments (1982).

Last but not least, regarding foreign judgments, in *Alfadda v Fenn*,[677] it was held that the policy considerations are also relevant to American courts' granting of issue preclusion effect to foreign judgments. These policy considerations are: the desire to avoid duplication of effort and consequent waste involved in reconsidering a matter that has already been litigated; the concern to protect the successful litigant, whether plaintiff or defendant, from harassing or using evasive tactics on the part of his previously unsuccessful opponent.[678]

5.6 Concluding remarks

It follows from the above that the leading approaches are not strictly applied by courts in the selected jurisdictions in giving issue preclusion to foreign judgments.

Under Brussels Ibis, the differences in the scope of issue preclusion among the member states make it challenging to apply the leading approach. Where the law of the court of origin has a narrower scope of issue preclusion than the law of the court addressed, the court addressed is supposed to use its law to give the same or equivalent effect to foreign judgments. Where the law of the court of origin has a broader scope of issue preclusion than the law of the court addressed, the prevailing approach provides no guidance to the court addressed to determine the issue preclusion effect. Nevertheless, in some cases the court addressed only refers to foreign substantive rules to decide the exact content of the "issues" rather than to foreign preclusion law to decide whether the issue should have a preclusive effect. Moreover, Brussels Ibis grants certain autonomous issue preclusion effects to its judgments, i.e. regarding the determination on jurisdiction.

Outside of the uniform rules, English courts hold on to their unilateral approach to determine the issue preclusion effect of foreign judgments. The issues concerned are those fundamental to the previous decisions. As for domestic judgments, issues that should have been raised and decided by the previous court can have issue preclusion effect, while it is not the case for foreign judgments. The identity of issues is determined based on the identity of "the facts, circumstances and arguments" supporting the issues. The differences between the law of the court of origin and the law of the court addressed do not affect the identity of issues. In principle, the English courts consider the requirement of the same parties for issue preclusion as necessary. Moreover, special circumstances, such as newly-found evidence, change of law, and the input-output ratio of the parties to litigate in the foreign country also have implications for English courts to give issue preclusion effect to foreign judgments.

677 966 F Supp 1317 (1997), referring to Von Mehren and Trautman (1968).
678 *Alfadda v Fenn* 966 F Supp 1317 (1997).

American courts are more diverse in determining the issue preclusion effect of foreign judgments. American courts may adopt either of two leading approaches based on the practical needs of the case. In some cases, for example, they are cautious to apply the laws of the court addressed to give broader issue preclusion effect to foreign judgments. In other cases, the reference to foreign law is a good excuse to deny foreign judgments preclusive effect. Under the US law, the issues that can be the subject matter of issue preclusion should have been actually litigated and actually decided. The issues should be essential to the previous judgments in order to guarantee sufficient care has been taken by the courts and the vigorous litigation between the parties. Identity of issues requires both identical facts and identical rules. In case of foreign judgments, differences between the law of the court origin and the law of the court addressed do not necessarily prevent the issues from being identical. Compared with English practice, the most notable characteristic of American practice is that American courts tend to abandon the requirement of the same parties, especially in federal courts and in some state courts. This does not necessarily mean that the US law has relaxed its standards on giving issue preclusion effect to judgments. American courts have set additional limits to avoid injustice arising from the abandonment of the requirement of the same parties. Finally, before giving preclusive effect to foreign judgments, American courts will also take into account remedies of the party before the court of origin, practical difficulties of the party to litigate in the court of origin as well as some policy considerations, i.e. avoiding the duplication of effort and protecting litigants from the harassing or evasive tactics of their opponents.

In general, the issue preclusion effect of foreign judgments in the selected jurisdictions is limited. As we know, the common law countries have already taken the lead to recognize the binding effect as to the determinations of specific issues by a prior court. Except for several specific issues, such as the issue of jurisdiction, the common law courts have much discretion in the process. And this makes such an effect subtle. Understandably, in cases concerning issue preclusion, the subsequent action concerns a different cause of action from the first action. If the court addressed defers too much to the determinations of a foreign court, this equates to compelling the parties to contest every minor issue thoroughly in a foreign court in case of being bound by that result forever and ever. Nonetheless, it is still expected that, in line with the increasingly development of recognition law, the court addressed can limit their discretion to a reasonable extent and allow the parties to make full use of the issue preclusion effect of foreign judgments and get protection from repetitive litigation on specific issues.

Part III
Recognition of Foreign Judgments With a Focus on Maritime Cases

6 Recognition of Foreign Judgments in Typical Maritime Cases

6.1 Introduction

The mobility of ships is a decisive factor that makes it possible for a maritime claim to arise anywhere during a ship's voyage. Therefore, it is common for a ship to be arrested or a shipowner (or other equivalent parties, such as a ship operator) to be sued in any ports of call where not all the claimants or related parties are close to. The mobility of ships also facilitates forum shopping in maritime cases. As claims may arise anywhere, it is possible for both a shipowner and a claimant to take the initiative to seize a favourable jurisdiction. For example, a shipowner may select a forum by instituting declaratory proceedings and a claimant can choose where to sue by arresting a ship based on which a follow-up liability proceeding may proceed. Due to the possibly wide spread of claims and suits, a compelling need of recognition of foreign judgments arises in practice, not only concerning ordinary monetary judgments on maritime claims, but also some typical types of maritime judgments, such as ship arrest orders, judgments on the establishment of limitation fund and so on.

With the development of recognition law, the scope of judgments that can be recognized is expanding and is no longer limited to those that merely determine that a sum of money is to be paid by one party to another or to those that are of a final nature. This makes it possible for some typical maritime judgments to be recognized and fully exert their effect as required by international maritime conventions. Further, in the maritime law arena, preparatory works for a specialized international convention for the recognition of foreign judgments on judicial sales of ships are undertaken.

In this chapter, based on the practice and legislative efforts, the author will illustrate how the effect of the typical maritime judgments is amplified by the regime of recognition of foreign judgments and thus serves the interest of the shipping stakeholders. By doing so, it aims to re-clarify the practical importance of recognition of foreign judgments. Furthermore, attention will also be given to the question of how the rules of maritime law interact with the practice of recognition of foreign maritime judgments.

6.2 Recognition of foreign ship arrest orders

6.2.1 Introduction

Ship arrest is a typical mechanism in maritime law. There are two specialized international conventions in this field, i.e. the 1952 Brussels Arrest Convention and the 1999 Geneva Arrest Convention.[679] The concept of ship arrest under the international conventions is a hybrid of the common law concept of action *in rem* and the civil law conservatory or enforcement measures (*saisie conservatoire and saisie exécutoire*). The common law and civil law traditions have different views on when a ship arrest is possible. As for the former, it relies on a unique proceeding under the admiralty jurisdiction in which a claimant is only allowed to raise a maritime claim against the ship that gave rise to the claim[680] and to obtain its detention.[681] If the court later sustains the claim, the judgment is enforceable upon the arrested ship. In contrast, civil law countries normally permit any property of the debtor to be detained as security for the upcoming judgment. It follows that a ship can be arrested or attached for any claims as long as it belongs to the debtor of the claims.[682] The combined effect of the two approaches is quite beneficial to the claimants since they can choose a favourable jurisdiction to arrest a ship as the ship is moving from one jurisdiction to another. As a result, the shipowners are always at the mercy of the different legal systems and ships are very susceptible to arrest.

To balance the interests between maritime claimants and shipowners, it is generally accepted that the Arrest Conventions constitute a compromise between common law and civil law approaches. It has been pointed out that in the French version of the Arrest Conventions, the term of "arrest" is translated as "*saisie*", which indicates that the Arrest Conventions applies to both arrest *in rem* in common law countries and conservatory measures in civil law countries.[683] On the one hand, it broadens the scope of ships that can be arrested which is quite limited based on the common law approach. Under the two Arrest Conventions, the subject matter of arrest not only concerns the particular ship that gives rise to the claim but also other ships which at the time when the claim arose were owned by the shipowner or a demise charterer who is liable for the claim.[684] On the other

679 They are respectively short for the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships 1952 and the International Convention on the Arrest of Ships 1999.

680 In some cases, an action *in rem* may also against cargo, freight, or bunkers if the claim concerns the service provided to the ship.

681 Mandaraka-Sheppard (2013) p.9-10. An action *in rem* was historically founded on the notion of maritime lien, therefore, it was only against the ship that gave rise to the damages.

682 Berlingieri (2017) para.1.11.

683 Tetley (1998) p.1941 and footnote 279.

684 Article 3(1) & (4) 1952 Brussels Arrest Convention and Article 3 1999 Geneva Arrest Convention.

hand, for shipowners whose ships fly the flags of the contracting states, the two Arrest Conventions protect their ships from being arrested based on those non-maritime, but rather land-based claims by expressly providing for a closed list of maritime claims.[685]

Currently, the 1952 Brussels Arrest Convention is widely accepted by the shipping countries.[686] Therefore, the following discussion will be mainly in the context of the 1952 Brussels Arrest Convention.

6.2.2 The nature of ship arrest orders

Generally speaking, there are three types of provisional measures. The first type concerns those measures that are to preserve the *status quo* until the dispute is resolved and to secure the enforcement of the decision on the merits. The second type concerns measures to facilitate or organize the future resolution of the matter, such as measures to collect or secure evidence. And the third type concerns anticipatory measures, which normally grant a pre-emptive decision on the substance of the case, such as interim payment.[687]

Unlike judgments that determine the rights and obligations between the parties, in a ship arrest order a court only determines whether or not to allow the detention of ship to secure the future satisfaction of maritime claims based on the facts of the case. It is apparent that the ship arrest orders generally fall within the scope of the first type of provisional measures.

6.2.3 Recognition of foreign ship arrest orders

6.2.3.1 Recognition of foreign provisional measures in general

Traditionally, provisional measures can only be sought against assets located within the jurisdiction, since it follows from international law that courts cannot exercise their power on the territory of another country because of sovereignty of the national state.[688] In cases where the property of the debtor can easily be transferred or where the subject matter is intangible, there is a need for recognition of the exterritorial effect of provisional measures.[689] And if it is possible, it means that the claimants do not need to seek remedies

685 Article 1 1952 Brussels Arrest Convention and Article 1 1999 Geneva Arrest Convention.

686 Up to now, there are about 95 states, regions and oversea territories that have acceded the 1952 Brussels Arrest Convention https://diplomatie.belgium.be/sites/default/files/downloads/Zeerecht_9.pdf accessed 18 July 2021. And 10 countries have acceded the 1999 Geneva Convention https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-8&chapter=12&clang=_enaccecced 18 July 2021.

687 Kramer (2003) p.306.

688 Collins (1992) p.128.

689 For example, the subject matter of the provisional measures can be the news on the internet or intellectual property.

repetitively in different jurisdictions if the debtors deliberately hide or transfer their assets or if the subject matter is intangible.

However, provisional measures were generally considered as not suitable for recognition and enforcement since they are not final and conclusive, especially under national laws.[690] And it was even viewed that to give exterritorial effect to a foreign provisional measure is against the principle of territoriality.[691] Therefore, the court addressed has much discretion to decide whether to give effect to foreign provisional measures.[692] As some provisional measures are granted *ex parte* either because the matter is urgent or the debtor may intentionally frustrate the provisional measure if he is forewarned of it, they can easily be challenged at the stage of recognition and enforcement on the grounds that the grant of the provisional measure lacks due process.[693] Nevertheless, a notable exception is provided by the English 1933 Act.[694] It provides that a foreign interim payment order can be the subject matter of recognition and enforcement. As the 1933 Act only applies to those countries which have reciprocal arrangements with the UK, it is understandable that recognition of foreign interim payment orders can be justified by the reciprocity between the states. Another reason for this special treatment of foreign interim payment orders may lie in the legal nature of the interim payment order. As noted, provisional measures at some points could acquire a definitive character based on the attitudes of the parties, since the granting or refusal of a provisional measure may oblige parties *de facto* to bring an end to legal proceedings.[695] It has even been suggested that interim payment orders should not be qualified as provisional measures, since they frequently pre-empt the substance of the case and determine the rights and obligations between the parties.[696]

Unlike national laws, Brussels Ibis affirms the recognition and enforcement of foreign provisional measures. It expressly provides that they can be recognized and enforced as other judgments if the court that grants the measure has jurisdiction on the merits of the

690 Mclachlan (2005) p.13. For example, in § 488 Restatement (Fourth) of Foreign Relations Law (2018), only final and conclusive foreign injunctions can be recognized and enforced by American courts.

691 Case no. CPF 8553/2015/4 / CA3 "C., E. s/medida cautelar" Juzgado n° 1 - Secretaría n° 1, AMARA CRIMINAL Y CORRECCIONAL FEDERAL, nos Aires, 16 de junio de 2020. More information on the case can be found in https://conflictoflaws.net/2020/same-region-two-different-rulings-on-fake-news-at-the-internet/.

692 Collins (1992) ff.106.

693 Mclachlan (2005) p.11-12. See also *Denilauler v Couchet Frères* (Case 125/79) [1980] ECR 1533.

694 Article 1(2)(a) Foreign Judgment (Reciprocal Enforcement) Act 1933.

695 Dickinson (2010) p.541.

696 Mclachlan ff.8. For example, when a Dutch Kort geding is granted, only in about 5% of the cases parties do commence main proceedings parallel to or after commencing a *kort geding*, see in Kramer (2003) p.307-308.

case and the measure is served on the defendant prior to its enforcement.[697] Given this, foreign ship arrest orders can be recognized as well as enforced under Brussels Ibis.

6.2.3.2 Qualifying ship arrest orders as provisional measures under Brussels Ibis

Before a ship arrest order is sought for recognition or enforcement under Brussels Ibis, a party should first establish that a ship arrest order falls within the scope of provisional measures of Brussels Ibis. There is no definition of provisional measures under Brussels Ibis,[698] but in Recital 25 it gives an example of provisional measures concerning protective orders aimed at obtaining information or preserving evidence and a counter-example concerning orders on hearing of a witness.[699]

In *Reichert v Dresdner Bank II*,[700] the ECJ gave a general interpretation on provisional measures. It was held that provisional measures should be understood as measures intended to preserve a factual or legal situation so as to safeguard rights, the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter. In other cases, the ECJ seems to establish different requirements for provisional measures based on whether the court that grants the measure has the jurisdiction on the merits of the case. In *Denilauler*,[701] the recognition and enforcement of a French order of attachment was sought in Germany against the debtor's German bank account. The French court which granted the order also had jurisdiction on the merits of the case. Based on this background, it was held by the ECJ that, based on the facts of the case and commercial practice, provisional measures might be placed with a time-limit as regards the nature of the assets or goods subject to the measures contemplated.[702] And it was also held that provisional measures could be ordered accompanied with a guarantee for the sake of possible damages caused to the debtor, especially where the court eventually gives the judgment for the debtor.[703]

In contrast, on many occasions, the court grants a provisional measure entirely independent from the proceedings on the merits. For example, a payment order is sought when the substantive proceedings have not been raised or are pending before the court of

697 Recital 33 Brussels Ibis. By this provision, doubts and uncertainty as shown in the previous cases are removed, see *Mietz v Intership Yachting Sneek BV* (Case C-99/96) [1999] ECR I-2277; *Italian Leather SpA v WECO Polstermöbel GmbH & Co* (Case C-80/00) [2002] ECR I-4995. Recital 33 in fact denies the effect of the two cases as regards the requirement for the recognition and enforcement of provisional measures. See also *Denilauler v Couchet Frères* (Case 125/79) [1980] ECR 1533. Recital 33 in fact confirms the holding of this case.

698 Article 35 Brussels Ibis.

699 This is actually the confirmation of the holding in *St Paul Dairy Industries NV v Unibel Exser BVBA* (Case C-104/03) [2005] ECR I-3581.

700 (Case C-261/90) [1992] ECR I-2149.

701 *Denilauler v Couchet Frères* (Case 125/79) [1980] ECR 1533.

702 Ibid.

703 Ibid.

another member state. In this scenario, the scope of provisional measures under the Brussels Ibis is more restricted. In *Van Uden*,[704] the Dutch court that granted the interim payment order in summary relief proceeding did not have jurisdiction on the merits of the case due to the existence of an arbitration agreement. The ECJ held that an interim payment can only be considered as a provisional measure if there is a real connecting link between the subject matter of the measure sought and the territorial jurisdiction of the court granting them, unless, first, the assets are located or will be located in the territorial jurisdiction of the court granting the order,[705] and second, the interim payment order is guaranteed by a repayment guarantee provided by the applicant.[706]

From case law, it can be found that where the court granting the order has jurisdiction on the merits of the case, the requirements for the provisional measures suggested by the ECJ are only discretionary. However, in cases where the court granting the order does not have the jurisdiction on the merits of the case, the requirements for the provisional measures seem to be mandatory. Nevertheless, it can also be argued that there are different requirements for different types of provisional measures under Brussels Ibis. In *Denilauler*,[707] it concerned the requirements for an attachment order whose main function was to ensure that the claim of the judgment creditor could be paid. In contrast, in *Van Uden*,[708] it concerned the requirements for an interim payment order, which may have an anticipatory effect of preempting the decision on the substance of the case.[709]

In combination with the rules and practice of ship arrest, it can be imagined that in most cases ship arrest orders can be considered as a provisional measure under Brussels Ibis. First, there is no question that the function of a ship arrest order is to secure the satisfaction of maritime claims for the interests of the claimant. Second, even though on some occasions the ECJ held that the provision of a counter-guarantee is a pre-condition for provisional measures, it can be argued that this requirement is not mandatory but discretionary. As held by the ECJ in *Denilauler*,[710] the provision of a guarantee by the arrestor may be imposed based on the facts of the case and commercial practice in cases concerning attachment orders. Moreover, in the shipping practice, it is also common that a ship arrest order is granted upon the provision of guarantee from the shipowner or his insurer. Third, an arrest order is usually sought in a court of a state whose port the target ship is to call at. This means that the requirement of a real connecting link is also satisfied.

704 *Van Uden Maritime BV v Firma Deco Line* (Case C-391/95) [1998] ECR I-7091.
705 Ibid.
706 Ibid.
707 *Denilauler v Couchet Frères* (Case 125/79) [1980] ECR 1533.
708 *Van Uden Maritime BV v Firma Deco Line* (Case C-391/95) [1998] ECR I-7091.
709 Ibid. para.46.
710 *Denilauler v Couchet Frères* (Case 125/79) [1980] ECR 1533.

6.2.4 Recognition of the effect of foreign arrest orders

6.2.4.1 The effect of ship arrest orders on precluding re-arrest of ships

The Arrest Conventions allow a claimant to apply for a ship arrest as long as he has a stipulated maritime claim under the conventions. To balance the interests between maritime claimants and shipowners, the Arrest Conventions adopt specific provisions to prevent repetitive arrests of ships. The basic idea of this is that if a ship has been arrested or if security has been given for a claim, a new arrest of that ship or other ships in the same ownership for the same claim should be precluded.[711] As such an effect is artificially created, the precondition for invoking this effect is that the ship arrest should be in line with the requirements under the conventions. If the arrest of a ship is not for securing a maritime claim as provided by the conventions, e.g. an arrest of a ship for enforcement of foreign judgments[712] or for other purposes,[713] the arrest of a ship is excluded from the conventions and has no effect of precluding the re-arrest of a ship.

Nevertheless, the invocation of such prohibitive effect resulting from a prior ship arrest has exceptions. According to Article 3(3) 1952 Brussels Arrest Convention, if the security given for the release of the ship has been released or there is good cause, the re-arrest of the ship or any other ships in the same ownership is not precluded. The understanding of this provision, especially in terms of the scope of exceptions, varies when it is incorporated into national laws by the contracting states. It follows that the effect of a ship arrest order as to precluding the re-arrest of a ship also varies from jurisdiction to jurisdiction. For example, under Nigerian law, the effect of a ship arrest order on precluding the re-arrest of a ship is relatively broad since only in limited situations can the re-arrest of ship be allowed. Specifically, only where the first arrest was invalid, or the first arrest was unlawfully removed from the custody of the Admiralty, or the security for the claim for which the leave for the arrest was granted was not sufficient and the claim should be secured by a maritime lien,[714] a re-arrest can be sustained. In contrast, some national laws hold a relaxed view on the re-arrest of ships, therefore, the effect of a ship arrest order on prohibiting the re-arrest of a ship is accordingly limited. For example, under English law, the re-arrest of ship is generally allowed if the prior security is insufficient and regardless of whether the claim was secured by a maritime lien or not, provided that the total security does not exceed the value of the property at the time of the original arrest or at the time security

711 Article 3 (3) 1952 Brussels Arrest Convention and Article 5(1) International Convention on Arrest of Ships 1999. The discussion will be based on the provision under the 1952 Brussels Arrest Convention. The discussion below will mainly focus on the 1952 Brussels Arrest Convention due to its wider application.

712 Article 1(2) 1952 Arrest Convention and Article 1(2) 1999 Geneva Arrest Convention.

713 E.g. a detention by port-control or a criminal law arrest.

714 Berlingieri (2017) para.15.27.

was first given.[715] In this case, it seems less likely that a shipowner relies on a prior ship arrest order and argues that the subsequent arrest should be precluded than that a claimant argues that the security is insufficient for the claim.

6.2.4.2 Recognition of foreign ship arrest order under Brussels Ibis

When recognition of a ship arrest order is sought under Brussels Ibis, according to the principle established by *Hoffmann v Krieg*,[716] it follows that the effect of a ship arrest order in the court of origin (if it is a contracting state of Arrest Convention) can be transferred to all the member states of the EU, regardless of whether the state of the court addressed and the state of origin are parties to the same Arrest Conventions, i.e. 1952 Brussels Arrest Convention and 1999 Geneva Arrest Convention and whether the two states have the same understanding of the effect of ship arrest orders on precluding the re-arrest of ships.

More importantly, under Brussels Ibis, the above-mentioned autonomous preclusive effect does also exist in cases concerning ship arrest orders.[717] In a reported French case,[718] the buyer of a ship sought to arrest the seller's ship in France based upon breach of contract. However, before the buyer applied to arrest the ship before the French court, he had already sought ship arrest in Greece. The Greek court denied leave to arrest the ship due to non-compliance with the requirements for a ship arrest. The seller argued that the French court should recognize the Greek decision on refusing to arrest the ship, even though the French law on ship arrest is different from Greek law. It was held by the French Supreme Court that, according to Article 33 Brussels I, the Greek decision should be recognized. The Greek decision concerned the same parties, the same object, and the same cause as the arrest application before the court. Therefore, the Greek decision has the effect of precluding the French court from deciding the case again.[719]

In fact, an English court has once expressed the same view in a similar case.[720] The court did not rely on the Brussels Convention 1968 but instead used its own rules to give judgment in favour of the shipowner. In The Tjaskemolen Profer AG,[721] the vessel was arrested and then released by a Dutch court before the plaintiff sought to re-arrest it in an English court. The shipowner argued that the order of the Dutch court in respect of the lifting of the ship arrest should be recognized under the Brussels Convention 1968. The court then held that, if a plaintiff were to seek to arrest a vessel in respect of the same claim

715 Rule 6.7 (3) Practice Direction of CPR.
716 (Case-145/86) [1988] ECR 645.
717 See Part II Chapter 4 above.
718 Coure de Cassation, Civil, Commercial Chamber, March 8, 2011, 09-13.830. The details of the case can be found in 'Res Judicata for foreign freezing orders?' http://conflictoflaws.net/2010/res-judicata-for-foreign-freezing-orders/ accessed 18 July 2021.
719 Ibid.
720 *The Tjaskemolen Profer AG v Owners of the ship Tjaskemolen* [1997] 2 Lloyd's Rep 476 (QB).
721 Ibid.

in one jurisdiction after another, it might be an abuse of process to permit an arrest in England on the ground that to do so would be oppressive and vexatious. As has been discussed above, English courts prefer to use their own rules to give preclusive effect to foreign judgments, and this case is consistent with their preferences.[722]

Based on the above, it is submitted that the recognition of foreign ship arrest under Brussels Ibis can be used by a shipowner to be protected from re-arrest. With the assistance of Brussels Ibis, a shipowner could seek the effect of a prior arrest order of a foreign court to preclude a subsequent re-arrest of ships in the court addressed. In this connection, the law of the court of origin is decisive as to the scope of effect of the ship arrest order. If the law of the court of origin has a limited view on the prohibitive effect of ship arrest orders,[723] a shipowner can only have limited protection in the court addressed by a prior ship arrest order. In contrast, if the law of the court of origin has a broad view on the prohibitive effect of ship arrest orders,[724] a shipowner can be well protected from re-arrest in almost all the European countries through the Brussels Regime.

Furthermore, case law also shows that, where a prior arrest is denied by the foreign court, the shipowner can also seek the autonomous preclusive effect of the foreign arrest denial to preclude a subsequent re-arrest provided that the latter is based on the same claim and between the same parties. As in this case the preclusive effect of the prior order is derived from Brussels Ibis *per se*, it does not even matter what the views on re-arrest of ships of the courts of state of origin are.

6.2.5 Recognition and enforcement of foreign arrest orders

In cases where the property of the debtor can easily be transferred or escape, it may be practical for the claimants to enforce a provisional measure exterritorialy. Brussels Ibis embraces the exterritorial effect of provisional measures but with limitations. Based on Recital 33, provisional measures with cross-border effect can only be sought in a court that has jurisdiction on the merits under the Regulation, otherwise, it cannot be enforced abroad.

In line with this provision, in March 2015, the Rotterdam court granted a ship arrest order with cross-border effect upon the claimant's application.[725] After that, the claimant sought to enforce the arrest order on an inland vessel in Germany. Considering that the

722 See Chapter 4 Section 4.3.

723 It means that it has a broad understanding of the exceptions under Article 3(3) 1952 Brussels Arrest Convention.

724 It means that it has a limited understanding of the exceptions under Article 3(3) 1952 Brussels Arrest Convention.

725 *Allegro BV v Fanty-GT AD*, Rechtbank Rotterdam, ECLI: NL: RBROT:2015:3395, NTHR 2015, 274.

granting court has jurisdiction on the merits of the case, the German court enforced the order and arrested the inland vessel in Germany.

It is shown that a maritime claimant can apply for a ship arrest order with cross-border effect in a court that has the jurisdiction on the merits of the case. As long as a shipowner (or a demise charter) runs his ships within European territorial waters, a claimant can simply seek enforcement of the ship arrest order in the ports of any EU member states where the ship may call at and without the need to re-apply for a ship arrest in the court addressed. If between the parties there is an exclusive jurisdiction agreement conferring jurisdiction to a Dutch court or other courts of EU member states who also favour ship arrest orders with cross-border effect, it would be quite advantageous for the claimant side. This is because when a court is designated by a valid exclusive jurisdiction clause, other courts of EU member states must stay their proceedings.[726] The designated court not only has exclusive jurisdiction over the merits, but is also entitled to grant an exterritorially enforceable ship arrest order.

However, Recital 33 does not clearly provide whether a court with jurisdiction on the merits of the case should actually seize the case before it grants a provisional measure with exterritorial effect. From the current text of Recital 33, it seems that a provisional measure with exterritorial effect can be granted even though a court has not actually seized the case. However, as in many cases more than one court has jurisdiction on the merits based on the rules of Brussels Ibis, it seems possible for a claimant to argue that the granting court has jurisdiction on the merits and the court is capable of issuing a provisional measure with exterritorial effect even though the case is pending before another court. In this case, as it might concern more than one court having jurisdiction on the merits and entitled to grant a provisional measure with exterritorial effect, a conflict between provisional measures might arise. Therefore, it has been suggested that a court should be required to actually seize the case before other courts recognize the cross-border effect of a provisional measure granted by the first court.[727] It is submitted that, as the recognition and enforcement of provisional measures is so advantageous to the interest of the claimants, it is not unfair to compel them to institute the suit and enjoy the benefits on the condition that the court has actually seized the case. In relation to the practice of ship arrest, if the effect of ship arrest orders can be transferred cross the border within the EU, there is no need for a claimant to worry about the transferring of the ships owned by debtors, during the time consumed by the institution of the suit.

726 Article 25 and 31 Brussels Ibis.
727 Dickinson (2010) p.545-546.

6.2.6 Concluding remarks

Based on the prevailing rules on the recognition of foreign judgments, the subject matter of recognition mainly concerns final judgments, rather than judgments of a provisional nature.[728] For practical needs, provisional measures are often given in relation to acts or things abroad. As foreign provisional measures are normally not final and can be changed at a later stage, on the national law level, whether to give effect to these provisional measures used to be at the discretion of the court addressed.[729] And it was even viewed as a violation of the territory of law if a foreign provisional measure is given exterritorial effect and enforced by a local court.[730]

The practice under Brussels Ibis reveals that there is an increasing need for the recognition of foreign provisional measures between EU member states as long as the granting court satisfies the jurisdiction requirement. In cases concerning ship arrest orders, this arrangement enhances the effect of foreign ship arrest orders under the international maritime conventions. It can be shown that the recognition of foreign ship arrest orders is beneficial for shipowners as they can get protection from the re-arrest of ships as long as the law of the court of origin grants a broad prohibitive effect to a ship arrest order. The recognition regime of Brussels Ibis also allows a shipowner to get rid of a repetitive arrest when the first arrest denial was recognized by the court addressed. As for the claimants, given the possibilities of recognition and enforcement of provisional measures under Brussels Ibis, it is possible to apply for a ship arrest order with exterritorial effect in a court which has jurisdiction on the merits of the case to secure a maritime claim. Where a ship subject to an arrest order flees the state of the granting court, the claimant can seek enforcement of such an order in other member states instead of applying for another ship arrest order.

Admittedly, in the era of globalization, the assets of a debtor are usually widely distributed and easily transferred, and it is practical for a creditor to seek the exterritorial effect of a foreign provisional measure to facilitate the realization of his claim. However, it is still valid to question whether the acts or things in one state should be affected by the law of another state where the main proceeding is initiated rather than the law of that state where the acts take place or things are located.[731] It should also be noted that, under Brussels

728 See Chapter 2 Section 2.4.

729 Collins (1992), ff.106.

730 Case no. CPF 8553/2015/4 / CA3 "C., E. s/medida cautelar" Juzgado n° 1 - Secretaría n° 1, AMARA CRIMINAL Y CORRECCIONAL FEDERAL, nos Aires, 16 de junio de 2020, more information on the case can be found in https://conflictoflaws.net/2020/same-region-two-different-rulings-on-fake-news-at-the-internet/ accessed 18 July, 2021.

731 Generally speaking, the law of court from which a provisional measure is sought (*lex fori*) is applied to decide whether a provisional measure should be granted and based on what conditions a provisional measure is granted.

Ibis, recognition of the exterritorial effect of foreign provisional measures is by no means derived from the doctrine of *res judicata*, it is more about judicial cooperation between EU member states to facilitate the effective enforcement of judgments resulting from the main proceedings. Therefore, it can be assumed that, outside Brussels Ibis, these objectives are probably no longer binding. And there also seem to be no reasons to deny a court's judicial power in giving more weight to the interest of a local judgment debtor and refusing the recognition of a foreign provisional measure that may have an adverse effect on the assets of the judgment debtor.

6.3 Recognition of foreign judgments in limitation of liability cases

6.3.1 Introduction

Limitation of liabilityfund is a typical mechanism in maritime law. Considering the high risk of navigation at sea and for the sake of the prosperity of shipping industry, shipowners are granted with the right to limit their liability. The basic idea is that after sea accidents the liability of the shipowners is limited to a certain amount. If a shipowner puts a limited amount of money before the court, all claimants can only file against the fund to get compensation.[732]

There are several international conventions concerning the issues of limitation of liability. One group of conventions are the general limitation conventions. They provide for global limitation of liability regime to give privileges to shipowners, including those who involve in the operation of the ship,[733] and the salvors[734] (hereinafter together called the liable persons) to have a fixed amount of liability after accidents:

- 1924 Brussels Convention,[735]
- 1957 Brussels Convention,[736]
- 1979 Protocol to the 1957 Brussels Convention,[737]

732 Donovan (1979) p.1000. a

733 For example, Article 1(1) Convention on limitation of liability for maritime claims 1976 (hereinafter as 1996 LLMC) provides that, persons entitled to limit liability includes, charterer, manager and operator of a seagoing ship.

734 Article 1(3) 1996 LLMC.

735 International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-going Vessels 1924, which entered into force on 02.06.1931.

736 International Convention relating to the Limitation of the Liability of Owners of Sea-going ships 1957, which entered into force on 31.05.1968.

737 1979 Protocol amending the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, which entered into force 06.10.1984.

- 1976 LLMC,[738]
- 1976 LLMC as amended by the 1996 Protocol (1996 LLMC)[739] and the 2012 Amendments to the 1996 Protocol,[740]
- 2012 CLNI[741] and 1988 CLNI.[742]

The second group of conventions are those that provide for a separate civil liability for specific types of damages, which are:

- 1969 Civil liability Convention for Oil Pollution Damage (1969 CLC),[743] 1976 CLC,[744] 1992 CLC,[745]
- 1971 International Fund Convention (IFC),[746] 1976 IFC,[747] 1992 IFC,[748] and 2000 IFC,[749] and 2003 IFC,[750]

738 Convention on Limitation of Liability for Maritime Claims 1976, which entered into force on 01.12.1986 and as at 15.10.2021 had 55 contracting states representing 51.87 % of the world's shipping tonnage, based on information provided by the U.N. International Maritime Organization (IMO) on its website https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfTreaties.

739 Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976, which entered into force on 13.05.2004 and as at 15.10.2021 had 63 contracting states representing 69.13 % of the world's shipping tonnage.

740 2012 Amendments to the Protocol 1996 to Amend the Convention on Limitation of Liability for Maritime Claims 1976.

741 Strasbourg Convention on the Limitation of Liability of Owners of Inland Navigation Vessels 2012, which entered into force on 01.09.2019 and currently has 5 contracting states.

742 Strasbourg Convention on the Limitation of Liability of Owners of Inland Navigation Vessels 1988, which ceased to be in force on the same day as the entering into force of 2012 CLNI.

743 International Convention on Civil Liability for Oil Pollution Damage 1969, which entered into force in 19.06.1975 and as at 15.10.2021 has 32 contracting states representing 2.94% world tonnage.

744 Protocol of 1976 to the International Convention on Civil Liability for Oil Pollution Damage 1969, which entered into force in 08.04.1981 and as at 15.10.2021 has 53 contracting states representing 62.76% world tonnage.

745 Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage 1969，which entered into force on 30.5.1996 and as at 15.10.2021 has 144 contracting states representing 97.52% of world tonnage.

746 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971, which entered into force on 16.10.1978 and as at 15.10.2021 has 14 contracting states representing 2.02% of world tonnage.

747 Protocol of 1976 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971, which entered into force on 22.11.1994 and as at 15.10.2021 has 31 contracting states representing 53.83% of world tonnage.

748 Protocol of 1992 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971, which entered into force on 30.05.1996 and as at 15.10.2021 has 120 contracting states representing 94.42% of world tonnage.

749 Protocol of 2000 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971, which 27.06.2001 and has no contracting states.

750 Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992, which entered into force on 03.03.2005 and as at 15.10.2021 has 32 contracting states representing 15.76% of world tonnage.

- 1996 Liability Convention for Hazardous and Noxious Substances (HNS),[751] and the 2010 Protocol,[752]
- 1989 Civil Liability Convention Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD),[753]

A common core of this second group of conventions is that while the shipowners are granted the right to limit liability by these conventions, they are subject to a strict liability and a compulsory insurance obligation at the same time in order to ensure a proper level of compensation for damage resulting from oil pollution or hazardous or noxious substances or wreck removal costs. As for the Bunker and Nariobi Convention, it is clearly provided that any right to limit of the liable person under the general limitation regime should not be affected by the provisions under the specialized conventions,[754] by which particular claims that fall within the realm of these conventions should still be subject to the global limitation regime. Even though it has been argued that the actual intention of the state parties when drafting the Bunker is to establish a separate limitation regime by reference to LLMC, and Article 6 Bunker is merely to preserve any existing right of limitations, the latest developments have demonstrated that the global limitation regime is suitable to the particular claims as well.[755]

The third group of conventions provides for a separate limit for particular claims on the one hand, and on the other hand these conventions do not affect the general global limitation regime, therefore a double-limitation scenario will take place, these conventions are:

751 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996, which has not entered into force as at 15.10.2021 has 14 contracting states and representing 15.58% world tonnage.

752 Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996, which has not entered into force as at 15.10.2021 has 5 contracting states and representing 3.57% world tonnage.

753 Not entered into force.

754 Article 6 Bunker and Article 10 (2) Nariobi Convention.

755 Gutiérrez (2011) p.195-196.

- Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (1974 Athens Convention, Article 19),[756] 1976 Athens Convention,[757] 1990 Athens Convention[758] and 2002 Athens Convention.[759]
- Visby Rules (Article 8)[760] and Hague-Visby Rules (Article 8),[761]
- Hamburg Rules (Article 25 (1)),[762]
- Rotterdam Rules (Article 83),[763]

Taking the 2002 Athens Convention as example, Article 7 and Article 8 provide for a limit to the liability of the carrier for death and personal injury and for loss of or damage to luggage and vehicles on the one hand, and on the other hand Article 19 reserves the defendant carrier's right to invoke the global limitation of liability. When there are two sets of rules provide for the same issue of limitation of liability, problems may occur, and this is particularly the case between 1974 Athens Convention (and its predecessors) and 1976 LLMC (and its predecessors). For example, in the 2002 Athens Convention, the limit of liability for death and personal injury suffered by the passengers on the basis of strict liability of the carrier maximumly is 250,000 SDRs, however under the 1976 LLMC the liability for the passenger claims for is capped at 25,000,000 SDRs.[764] This means that, if a state is a contracting state both to the 2002 Athens Conventions and 1976 LLMC, only 100 passengers would be able to receive the full 250,000 SDRs if their claims are based on the strict liability of the carrier before the court of the state and this situation cannot be considered as fair in a catastrophic sea accident.[765]

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756 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea1974, which entered into force on 28.04.1987 as at 15.10.2021 has 24 contracting states representing 33.80% world tonnage.

757 Protocol of 1976 to the Convention relating to the Carriage of Passengers and their Luggage by Sea1974, which entered into force on 30.04.1987 as at 15.10.2021 has 16 contracting states representing 33.50% world tonnage.

758 Protocol of 1990 to the Convention relating to the Carriage of Passengers and their Luggage by Sea1974, which has not entered into force as at 15.10.2021 has 3 contracting states representing 0.16% world tonnage.

759 Protocol of 2002 to the Convention relating to the Carriage of Passengers and their Luggage by Sea1974, which entered into force on 23.04.2014 as at 15.10.2021 has 31 contracting states representing 43.87% world tonnage.

760 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924, which entered into force on 02.06.1931.

761 Protocol of 1968 to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, which entered into force on 23.06.1977.

762 United Nations Convention on the Carriage of Goods by Sea 1978, which entered into force on 01.11.1992 and has 35 contracting states.

763 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which has not entered into force.

764 Article 7 1976 LLMC provides that," in respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 46,666 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate, but not exceeding 25 million Units of Account."

765 Gutiérrez (2011) p.180.

Further, regarding the second and third group of conventions, these usually involve a standard rule[766] on recognition and enforcement of foreign judgments, by which, the drafters of the international conventions intend to facilitate the recognition and enforcement of judgments arising from the conventions. There are many reasons why the standard rule does not work well, and this results in that the uniform way of recognition and enforcement of judgments designed by the international conventions has to yield to national and regional rules on this point. In Chapter 7,[767] the author will discuss in depth that how the standard recognition clauses fulfil the function in different jurisdictions.

6.3.2 Different Approaches to limit liability

6.3.2.1 Invoking the right to limit as a defense

Based on Article 10 (1) 1996 LLMC (also 1976 LLMC), the invoking of the right to limit as a defence to a liability claim is not conditional upon the prior constitution of a limitation fund. In some jurisdictions, such as in the UK, it is possible for a liable person either to invoke the right to limit either as a defence or a counterclaim in liability proceedings, or to institute limitation proceedings against multiple claimants after an incident with or without the constitution of a limitation fund. If the right to limit is merely invoked as a defence, the court will normally give a judgment for the claimant within the limit despite the fact that the recoverable damages exceed the limit[768] or grant to the liable person with a restricted limitation decree against the particular claimant(s).[769] It raises the question of whether a prior determination on the right to limit of the liable person could limit subsequent proceedings and whether a liable person could make use of a prior judgment of this kind against all the subsequent claims by claiming that he has the right to limit all his liability to a single amount.

In *The Waltraud*,[770] it was observed by Justice Sheen that if the liable person did not limit his liability by setting up a limitation fund instead of pleading the limit as a defence, the liable person could hardly have the benefit of 1976 LLMC and would have to pay an extra limit amount if there was another claim raised against him. It follows that if the liable

766 For example, Article X 1992 CLC, provides that, "1. Any judgment given by a Court with jurisdiction in accordance with Article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State, except: (a) where the judgment was obtained by fraud; or (b) where the defendant was not given reasonable notice and a fair opportunity to present his case. 2. A judgment recognized under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened."

767 See below Chapter 7 Section 7.2.3 and Section 7.3.2.3.

768 Meeson and Kimbell (2017) para.8.103-104.

769 CPR Part 61.11 (10).

770 [1991] 1 Lloyd's Rep 389 (QB).

person subsequently intends to seek the effect of the determination of his right to limit before a court of another state where a different liability proceeding is pending, this court is not only free to determine the merits of the right to limitation of liability without being bound by the previous decision but also free to order the liable person to pay an additional limited amount for the second claimant's damages. This holding is in fact in line with the doctrine of issue preclusion under English law.[771] If the issue of limitation of liability is only raised as a defence in a liability proceeding, the binding effect of the determination can only be invoked between the same parties in the subsequent proceeding. And the liable person has to raise his right to limit again in a new liability proceeding, even though the facts of the case are similar to the previous one.

Without constituting a limitation fund, the effect of invoking limitation as a defence lacks a towards-all nature. If the issue of limitation of liability is only raised as a defence in a liability proceeding, the binding effect of the determination can only be invoked between the same parties in the subsequent proceeding. And the liable person has to raise his right to limit again in a new liability proceeding, even though the facts of the case are similar to the previous one. And there is a risk that the limitation amount would not be divided pro rata over the various claims of the same kind (i.e. belonging to the same fund). The liable party may have to pay more than one limitation amount, and such an outcome would also contradict one of the basic principles of limitation of liability, i.e. that all claims within the same fund compete rateably in the division of the fund.

6.3.2.1 Constituting a limitation fund and its consequences under LLMCs

In order to have full protection, a liable person would be better advised to raise the right to limit by instituting a specialized limitation proceeding and constitute a limitation fund. As it is generally recognized that a limitation fund operates "*erga omnes*" (towards all) against all the claimants arising from the same incident, the limitation decree resulting from such action is theoretically creating a *res judicata* and the determination of the right to limit of the liable person which could restrict all the claimants arising from the same incident.[772] It also follows that all claimants have the opportunity to file their claims against the fund and such filing should not be considered an admission of the right to limitation in the same way that invoking limitation of liability under Article 1 (7) 1996 LLMC (also 1976 LLMC) is not to be construed as an admission of liability.[773]

Many of the provisions in 1996 LLMC and 1976 LLMC reveal that a limitation fund is conceived to have an *erga omnes* effect. Taking 1996 LLMC as an example, according to Article 9 (2), a limitation fund is applicable to the totality of claims against that fund.

771 See Chapter 5 Section 5.5.2.2.
772 Jackson (2005) para.24.10.
773 Tettenborn and Rose (2002).

The limits of liability determined in accordance with Article 7 shall apply to the aggregate of all claims subject thereto which may arise on any distinct occasion against the person or persons mentioned in paragraph 2 of Article 1 in respect of the ship referred to in Article 7 and any person for whose act, neglect or default he or they are responsible. And it is provided in Article 11(3) that a fund constituted by one of the persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2 of Article 9 or his insurer shall be deemed constituted by all persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2, respectively.

The *erga omnes* effect of a limitation fund can also be demonstrated by Article 13 1996 LLMC. The constitution of a limitation fund not only entitles a liable person to limit his liability against all claimants arising from a single incident, but it also provides a liable person with immunity effect from arrests or attachment on his ships and other assets. Therefore, the extent to which the effect of a foreign limitation fund is recognized determines to what extent the ships and assets of the liable person are protected. In Article 13(1) and (2), it is provided that,

> "where a limitation fund has been constituted in accordance with Article 11, any person having made a claim against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted."
> "after a limitation fund has been constituted in accordance with Article 11, any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, may be released by order of the Court or other competent authority of such State. However, such release shall always be ordered if the limitation fund has been constituted:
> at the port where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or at the port of disembarkation in respect of claims for loss of life or personal injury; or at the port of discharge in respect of damage to cargo; or in the State where the arrest is made."

The *erga omnes* immunity effect arising from the constitution of a limitation fund not only tends to create consequences for claimants that have filed a claim against the fund, but also for claimants who have not filed claims against the limitation fund. It is important that the claimant has the ability to file the claim rather than the fact that the claimant has filed the claim. By this Article, the drafters of the international conventions intended to give protection to the liable parties who are entitled to limitation and who have constituted a limitation fund from conservatory and enforcement measures against their assets.

6.3.3 Limits to the erga omnes effect of limitation fund

Even though the constitution of a limitation fund is deemed to have an *erga omnes* effect to shield all the claims against the liable person or arrests against his ships and other assets, it does not mean that the liable person can be absolutely protected after setting up the fund.[774] The reason lies in that the effect of a limitation fund can only take place between contracting states to the same convention, i.e. 1996 LLMC or 1976 LLMC.[775] In some cases, even between the contracting states to the same convention, a limitation fund may lack force. For example, if a liable person constitutes a limitation fund in a court of a contracting state of 1996 LLMC which has not made a reservation for wreck removal claims,[776] the effect of the limitation fund will not necessarily be recognized by a court in another contracting state of 1996 LLMC which makes a reservation on wreck removal claims, especially when the latter must decide whether to order the release of a ship arrested for a wreck removal claim.[777] Furthermore, where the limitation court is in a country that is a contracting state to an older (version of a) Limitation convention (e.g. 1924 Brussels Convention, 1957 Brussels Convention or 1976 LLMC) whereas the arrest court is in a country that is party to a later version (e.g. 1976 LLMC or 1996 LLMC), or where the arrest court is in a country (like Italy or the US) not party to any limitation convention.[778] Currently, the 1996 LLMC is widely adoped by European countries, which include 23 of the 27 EU member states,[779] and 3 of the EFTA member states[780] and the UK. There are states still following the 1976 LLMC[781] and other states not party to any general limitation conventions.[782] This means that the effect of Article 13 can be avoided by arresting a vessel in a non-contracting state. According to Article 13(2), except if the limitation fund has been constituted in one of the listed jurisdictions, and if the arrest of a ship or assets is for a claim which may be raised against the fund, the court has discretion to decide whether

774 Smeele (2006) p.230.

775 In contrast, according to Article 5 1957 LLMC, the protective effect that is advantageous to the liable person does not rely on the constitution of a limitation fund but on the determination by the court that the liable party has the right to limit.

776 Article 18(1)(a) 1996 LLMC.

777 Hoge Raad 29 September 2006, ECLI:NL:2006:AX3080, Schip & Schade 2007.For English translation, see in Smeele (2007) ff.111.

778 *The ICL Vikraman* [2003] EWHC 2320 (Comm) (At the moment of the constitution of limitation in London and ship arrest in Singapore, Singapore was not a party to 1976 LLMC); *Kingdom of Spain v American Bureau of Shipping* (ABS) ("The Prestige") 729 F Supp 2d 635 (S.D.N.Y. 2010).

779 As for EU member states, except Austria, Czechia, Italy, Slovakia, the rest have adopted the 1996 LLMC. These four states also do not follow the 1976 LLMC. http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf accessed 18 July 2021.

780 Switzerland is only member state of EFTA that follows the 1976 LLMC. http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf accessed 18 July 2021.

781 For example, Switzerland.

782 For example, Austria, Czechia, Italy, Slovakia.

or not to release the ship or return the alternative security.[783] Therefore, in most cases, the *erga omnes* effect of a limitation fund under this provision has limits, with the result that in many cases the transfer of the effect of a limitation fund from one state to another has to rely on a separate process of recognition of foreign judgments.

6.3.4 Recognition of a foreign limitation fund

6.3.4.1 Recognition of foreign judgments on the constitution of limitation fund

In some jurisdictions, when the court holds that the liable person is entitled to limit or all the claimants admit the liable person's right to limit, he may be required to establish a limitation fund before the court for the settlement of the claims. For example, under English law, the constitution of a limitation fund should be subject to the court's admission of the liable person's right to limit.[784] In this case, the court's ordering of the constitution of a limitation fund is supplementary to the limitation decree and has a final nature. However, in some other jurisdictions, the constitution of a limitation fund does not depend on whether the right to limit of the liable person has been determined.[785] Instead, the procedure of the constitution of limitation fund is a precondition that a liable person could invoke his right to limit against all the claimants.[786] In this case, the constitution of a limitation fund is ordered by a court after a summary review of the application to commence limitation proceedings without considering the merits of the case. The nature of the court's ordering is provisional. If the court later finds that the liable person is not entitled to limit, the order will be dismissed.

By comparison, in the former case the order of the constitution of a limitation fund is more likely to be recognized as it is of a final nature. If the court's ordering on the constitution of limitation fund is of a provisional nature, as discussed above,[787] on the national law level foreign provisional judgments are less likely to be recognized and enforced. However, this is possible under Brussels Ibis. The notable *Maersk Olie & Gas*[788] case concerned the issue of recognition of a foreign provisional order of the Dutch court of Groningen on the constitution of a limitation fund. In May 1985, a Dutch fishing trawler damaged newly laid pipelines of Maersk in the North Sea. At that time, the Netherlands still followed the 1957 Brussels Shipowners' Limitation of Liability Convention which provided for considerably lower limits, whereas Denmark had already implemented the

783 Compared with Article VI 1992 CLC, the release of shio or return of security are mandatory.
784 For example, in the UK, see CPR Part 61.11 (12) and (13). See Reynolds and Tsimplis (2012) p.136.
785 For example, in the Netherlands, see Art. 642a (1) Code of Civil Procedure. See Van Der Valk (2005).
786 Ibid.
787 See above Chapter 6 Section 6.2.3.1.
788 *Maersk Olie & Gas A/S v Firma M.de Haan en W de Boer* (Case C-39/02) [2004] ECR I-9657.

1976 LLMC with higher limits. Against this background, the shipowner constituted a limitation fund before the Dutch court of Groningen.[789] The Dutch court issued a judgment ordering the Dutch shipowner to constitute a limitation fund for the claims arising from the incident. Maersk in vain appealed the court's decision before the Leeuwarden Court of Appeal and then chose not to file its claims with the limitation court, but instead instituted liability proceedings before a Danish court.

The question arose whether the Dutch court's provisional decision on the constitution of limitation fund should be recognized by the Danish court when considering the liability claims and whether the earlier instituted Dutch limitation proceedings could have *lis pendens* effect to preclude the later instituted Danish liability proceedings. The ECJ held that the limitation proceedings and the liability proceedings concerned different causes of action, as the one aims to limit the liability and the other to establish the liability. Therefore, the Dutch limitation proceedings could not be used to prevent the institution of the liability proceedings before the Danish court based on the *lis pendens* rule. On the other hand, the ECJ observed that the Dutch judgment ordering the constitution of limitation fund was a judgment under Brussels Convention 1968, capable of recognition despite the fact that it was given at the initial stage of the proceedings and concerned a provisional determination on the maximum amount of liability of the liable person.

Based on the ECJ's ruling, the Danish Supreme Court held that the Dutch order on the constitution of the limitation fund should be recognized and taken as the basis for the Danish court's to decide shipowner's liability.[790] It further held that Maersk should have filed its claim against the limitation fund before the deadline. However, as Maersk had failed to do so, the limitation fund was returned and the limitation proceeding was concluded after the statutory period. Therefore, the Dutch shipowner was free of liability.[791]

It can be found that, under Brussels Ibis, a foreign judgment on the constitution of limitation fund in a court of a member state may not preclude liability proceedings from being instituted in other member states. Nevertheless, a foreign judgment on the constitution of a limitation fund does impose some effect on liability proceedings before other courts in the sense that all liability judgments must eventually be filed before the fund court in order to share in the division of the fund. This is also why parties often have long-lasting battles in order to have a better jurisdiction to constitute the limitation fund. In a recent case, *The Stolt Commitment*,[792] while the liability proceedings had taken place in Norway already, the Rotterdam Court allowed the shipowner to constitute a limitation

789 Based on the 1957 Brussels Convention, the constitution of limitation fund does not require a prior legal proceeding in respect of claims subject to limitation. This is not the case in the 1976 LLMC and 1996 LLMC.

790 Scandinavian Maritime Law Report (ND) 2005, p.631. The details in respect of the appeal before the Danish Supreme Court can be found Selvig (2005) p.26.

791 Ibid.

792 *The "Stolt Commitment"*, Hoge Raad 19 February 2019, ECLI:NL:HR:2020:956, Schip & Schade 2019, 51.

fund and initiate the limitation proceeding, as neither 1976 LLMC nor Brussels Ibis and Lugano Convention 2007 prohibit this. In practice, it is important for a liable person to choose a favourable jurisdiction to constitute a limitation fund, as the law of the fund court not only determines the limit amounts, but also what claims are subject to limitation. And if a limitation fund is constituted in a state which makes no reservation when accessing the international conventions, such as for wreck removal claims, while a claim on the wreck removal costs is raised in a state the law of which considers it not subject to limitation, the wreck removal claim may eventually be limited when it is filed with the fund.

Another point which needs to be raised here is that even though the ECJ held that the limitation proceeding and liability proceeding concern different causes of action and the *lis pendens* rule do not apply, the constitution of a limitation fund in a member state court may still have some effect to consolidate subsequent liability proceedings in other member states. In *Maersk Olie & Gas* case,[793] the ECJ analysed whether the Danish liability proceedings should be dismissed in the light of the Dutch judgment on the constitution of a limitation fund (the limitation proceeding) based on the rule of *lis pendens*. It was held that, the object of the former was to condemn the shipowner's liability while the latter was to limit the shipowner's liability. The facts underlying the two sets of proceedings were identical, but the underlying legal rules were different. Given this, the Dutch limitation proceeding and the Danish liability proceeding were considered as having different causes of action, and the Danish liability proceeding could not be precluded by the Dutch judgment on the constitution of limitation fund (limitation proceeding). Nevertheless, it should be noted that due to the failure of the claimant to file his claim with the limitation court before the expiry of the time bar, the Dutch limitation proceeding had been concluded. Therefore, the Dutch court did not consider the substance of the claims in order to decide whether the shipowner has the right to limit or not. If it were otherwise that there were claims that are actually filed against the Dutch limitation fund, the Dutch court would verify the claims and decide how to distribute the fund. And if one of the claims was disputed, the so-called *renvooi*-proceeding would be initiated, which equates to a normal liability proceeding. This means that given there might be a verification process in the limitation proceeding, the limitation proceeding could involve the same cause of action as liability proceeding on a substantive claim.[794]

793 (Case C-39/02) [2004] ECR I-9657.
794 Smeele (2006) p.231.

6.3.4.2 *Erga omnes* effect of limitation fund strengthened by the Brussels Regime

In *Seawheel Rhine/Assi Eurolink*,[795] the case concerned a collision between the vessel *Seawheel Rhine* and *Assi Eurolink*, which resulted in the sinking of *Assi Eurolink*. After the accident, the Dutch shipowner of *Assi Eurolink* filed a suit against the Swedish shipowner and the bareboat charterer of *Seawheel Rhine* in a Dutch court. After that, the Swedish shipowner instituted arbitration proceedings against the bareboat charterer in Sweden based on which a limitation fund was constituted by the bareboat charterer. After the establishment of the imitation fund, in order to avoid the wreck removal claims being subject to the Swedish limitation fund, the Dutch shipowner arrested the *Seawheel Rhine* in Rotterdam, and this arrest was lifted in return for a letter of undertaking on the Rotterdam Guarantee form. Later he filed his claim with the limitation fund before the Swedish court.

Given this, the Swedish defendants sought the return of the guarantees given for the release of the ship *Seawheel Rhine*. It was argued by the defendants that, as the Dutch shipowner has raised his claim against the Swedish limitation fund, according to Article 13 (1) 1976 LLMC, the Swedish limitation fund provides immunity from arrest by the Dutch shipowner. Referring to the *Maersk Olie* & *Gas* case,[796] the Dutch Supreme Court (Hoge Raad) sustained the defendant's argument and held that the Swedish court's decision on the constitution of the limitation fund had to be recognized under (now) Brussels Ibis and that the legal consequences of the decision should be based on Swedish law. The guarantees provided for the release of ship were ordered to be returned to the Swedish defendants.

Similarly, in another case,[797] the vessel *General Grot-Rowecki* (GGR) collided with the vessel *ECE*. The *ECE* sank after the collision. The owner of the *ECE* instituted an action against the owner of the *GGR* one year after the accident. Then the owner of the *GGR* constituted a limitation fund in front of a French court, where the 1976 LLMC was applied. Before the French limitation fund was established, the owner of *ECE* arrested the *GGR* in Norway, where the 1996 LLMC was applied at the time of the case. Based on Article 13 1976 LLMC, the owner of the *GGR* claimed that the limitation fund constituted in France should have the effect of releasing the ship from arrest in Norway.

Considering the parallel systems of the 1976 LLMC and 1996 LLMC, the Norwegian courts in some cases allow the effect of the constitution of limitation fund under the general limitation conventions to be expanded.[798] To be specific, if a party invokes Article 13 to

795 Hoge Raad 29 September 2006, ECLI:NL:2006:AX3080, Schip & Schade 2007.For English translation, see in Smeele (2007) ff.111.

796 (Case C-39/02) [2004] ECR I-9657.

797 *The General Grot-Rowecki*, HR-2007-02066-U (sak nr. 2007/1597). The details of the case can be found in Selvig (2011) p.359-390.

798 Selvig (2011). Notably, Article 178 (3) Norwegian Maritime Code (2013) even provides that, "the provisions of nos. 1 and 3 (the legal effect of constitution of limitation) can be given corresponding application if it is

seek the effect of a foreign limitation fund and the party was domiciled in a contracting state of the 1976 LLMC, the legal effect of the limitation fund can be recognized in Norway based on the 1976 LLMC. However, the exception was not satisfied in this case.

Instead, the owner of the *GGR* referred to the rules on recognition and enforcement of foreign judgments under the Lugano Convention 1988,[799] and argued that the French judgment on the establishment of the limitation fund should be given effect by the Norwegian Court. The Norwegian Supreme Court held that the French judgment on the effect of limitation fund should be recognized and be given same effect as in French law, and therefore released of the arrested ship.

From the above two cases, it can be found that, by making use of the concept of recognition of foreign judgments under the Brussels and Lugano Regimes, the effect of the constitution of a limitation fund in the court of origin can be exported to member states of the EU and the EFTA (except Liechtenstein). And it does not matter whether the country where the limitation fund is established and the country where the effect of the constitution of limitation fund is sought are contracting states to the same convention. Even if the latter does not join any general limitation conventions, as long as the liable party has constituted a limitation fund in a country, either a contracting state of 1976 LLMC or 1996 LLMC, and the requirements of Article 13 are satisfied, the immunity effect of the limitation fund can be achieved.

Moreover, the immunity effect arising from the constitution of limitation fund is discretionary in some other cases, and in some other cases imperative. If a party intends to seek the effect of the constitution of a limitation fund based on this provision, the precondition is that in the court where the limitation fund is established the immunity effect of the limitation fund is certain. Based on Article 13 (2), a court should first decide whether the claim for which conservatory measures are sought "may be raised against the fund". In this connection, it is submitted that, since a judgment on the constitution of a limitation fund is capable of recognition under the Brussels Regime, if a claim is subject to limitation based on the law of the country where the limitation fund is constituted, it can be considered as a claim that "may be raised against the fund". Furthermore, if the court in which the limitation fund is constituted is at the port where the occurrence took place, or if it took place outside of a port, at the first port of call thereafter, or at the port of disembarkation in respect of claims for loss of life or personal injury, or at the port of discharge in respect of damage to cargo, the immunity effect of the constitution of limitation fund becomes imperative. In this case, if the ships or other assets of the liable persons have

shown that a limitation fund constituted in a State which is not a Convention State can be considered equivalent to a limitation fund as mentioned in Section 177".

799 The Lugano Convention 1988, which has been superseded by the Lugano Convention 2007 is in substance identical based upon the Brussels Convention, respectively the Brussels I Regulation.

been arrested or attached in any contracting states on the basis of the above-mentioned claims, the effect of the limitation fund can be relied upon to request the release of the ship and assets, or the return of the guarantees that were given for the release of the ship.

To sum up, the recognition of a foreign limitation fund can preclude future arrests or attachments against ships or assets of the liable persons, preserving the status quo of the property of the liable persons like a shield. Furthermore, the recognition of foreign limitation fund can lead to an arrest or attachment being lifted, i.e. a change in the *status quo* of the property of the liable persons but in fact the *status quo* has been restored, this means that the liable persons can use this effect offensively to free their ships or other assets that have been arrested or attached abroad. Again, as it did in *Seawheel Rhine/Assi Eurolink*,[800] the recognition of a foreign limitation fund can also lead to the order to return the guarantee obtained under the threat of an arrest.

6.3.5 Recognition of liability judgments/settlements in limitation proceedings

6.3.5.1 Recognition of a prior settlement/payment

The general limitation conventions grant a right of subrogation to the liable person.[801] Article 12 (2) 1976 LLMC provides that if a liable person or his insurer has settled a claim that should have been brought against the fund, he can subrogate the right of that claimant and get credit for what he has paid in the division of the fund up to the amount he has paid. Where the liable person establishes that he may be compelled to pay at a later date, he can still enjoy the right of subrogation, and the court may order to set aside a sufficient sum to enable the liable person at such later date to get paid from the fund. It has been held that, the right of subrogation exists no matter whether the payment for the claim is in satisfaction of a foreign judgment or through settlement out of court.[802]

In *The "Giacinto Motta"*,[803] the cargo claim was first settled in the United States, which is not contracting state of the 1957 Brussels Convention. The liable shipowner then constituted a limitation fund before an English court, which at that time followed the 1957 Brussels Convention. Based on Article 3(3) 1957 Brussels Convention,[804] the liable

800 Hoge Raad 29 September 2006, ECLI:NL:2006:AX3080, Schip & Schade 2007.For English translation, see in Smeele (2007) ff.111.

801 Article 12(2) 1996 LLMC and 1976 LLMC, Article 3(3) 1957 LLMC.

802 *The Crathie* [1897] P 178; *The Kronprinz Olav* (1920) 5 Lloyd's Rep 203; *The Coaster* (1922) 10 Lloyd's Rep 592.

803 *The "Giacinto Motta"* [1977] 2 Lloyd's Rep. 221.

804 Article 3 (3) 1957 Brussels Convention provides that, "if before the fund is distributed the owner has paid in whole or in part any of the claims set out in Article 1 paragraph (1), he shall pro tanto be placed in the same position in relation to the fund as the claimant whose claim he has paid, but only to the extent that the claimant whose claim he has paid would have had a right of recovery against him under the national law of the State where the fund has been constituted."

shipowner claimed that he should get credit for what he had paid in the United States when distributing the limitation fund. It was held that, this provision grants the liable person an equitable right, up to the amount he has paid to file against the limitation fund. However, the amount of the claim should be limited to the figure to which the claimant would have been entitled under the law of the court where the limitation fund is constituted. Furthermore, it was held that, if the shipowner could get more than the amount of claim which had actually been brought against the fund, the position of other claimants would be worse.

It should also be noted that this provision leaves a backdoor through which a liable person may partially escape his liability if the prior claim is purposefully overstated or fraudulently created. Therefore, it is important that the court assesses the claim amount at the claim verification stage carefully. It is also for this reason that in practice the creditors are informed of all the claims that are made against the fund and a case management conference is held before the distribution of the fund.[805] As the general limitation conventions do not provide for the grounds based on which a foreign judgment can be challenged, therefore, creditors could rely on the requirements or grounds under the law of the fund court to request refusal of a prior judgment.

6.3.5.2 Recognition of a prior unpaid liability judgment

The recognition of a prior liability judgment implied in Article 12(2) 1996 LLMC only concerns the situation of to what extent the liable person can seek recognition of a prior paid liability judgment from the fund court to get credit from the fund. In cases where a claim is decided but has not yet been paid, the fund court may also face the issue as to how to recognize the effect of a prior liability judgment.

In this scenario, there was a view that a liability judgment given by courts other than the fund court is not binding and not creating a *res judicata*, and the fund court always has the power to re-decide the issue.[806] However, in *The Putbus*,[807] a collision dispute between the shipowners took place before the English court, while one of the defendants had set a limitation fund before a Dutch court. The English court gave its view as to whether the determination on the allocation of collision liability between the two shipowners will be recognized by the Dutch court where the limitation fund was constituted. It was observed by Lord Denning that there was no practical significance to contend that the English determination on the apportionment of collision liability was not binding on the Dutch

805 For example, Practice Direction of CPR, 61.11 para. 10.1 and 10.17.
806 Jackson (2005) para. 24.13.
807 *Owners of the Zenatia v Owners of the Putbus (The Putbus)* [1969] 1 Lloyd's Rep 253 (CA).

proceeding since the Dutch court had no evidence of the cause of the collision and would no doubt accept the finding of the English court.[808]

Apart from recognizing a foreign liability judgment based on practical necessity, it would be quite favourable for the liable person if a fund court is willing to recognize the prior liability judgment given for the claimants, especially when the claimants take the initiative to enforce the judgments against the fund. However, there is still the question of the extent to which a foreign liability judgment will be recognized when the court of origin and the fund court follow different limitation rules.

In *The Uno*,[809] the ship "*Uno*" collided with a barge in Germany in the Kiel Channel that connects the North Sea with the Baltic Sea and sank there in June 2002. The claimant, i.e. the German maritime authorities, filed a claim in respect of the wreck removal costs before the German court. The German court made a judgment for the claimant in April 2003. The shipowner chose not to invoke limitation or constitute a limitation fund before the German court, presumably because under German law the wreck removal claims were subject to a separate limitation amount under German law. Thereafter, when the claimant sought enforcement of the German judgment in Denmark under Brussels I, the shipowner immediately instituted a limitation fund in accordance with Danish law before the Danish court in order to invoke the limitation of liability under Danish law.[810]

The case was ultimately settled between the parties, and therefore the Danish court did not give its opinion on how the German liability judgment should be recognized and enforced. However, in academia, there appeared to be opposite views. One view holds that, insofar as a foreign judgment must be recognized without any special procedure being required and without any review as to substance under the Brussels Regime, the German judgment should be recognized and enforced in the full amount and not subject to the limitation fund. If the recognition and enforcement of the German judgment is linked with the limitation action in Denmark, this means that the judgment will be partly reconsidered as to substance.[811] In contrast, a different view suggests that the concept of recognition of foreign judgments does not prevent the court addressed from ordering that the German judgment is unenforceable based on the Danish limitation rules, and therefore,

808 Ibid.

809 Danish Weekly Law Reports 2005.2550. The details of the case can be found in Windahl (2009) ff.619; also in Selvig (2005) p.37-45. See also Smeele (2007).

810 Following the 1976 LLMC, Danish maritime law provides that, a limitation fund can be constituted when an arrest is petitioned or other enforcement proceedings are instituted before a Danish court in relation to "claims which by their nature can be subject to limitation". Even though both Germany and Denmark are contracting states of the 1976 LLMC, it should be noted that Germany made a reservation on the claims of wreck removal costs while Denmark did not. N.B. Under Danish law the limitation amount of Article 6 (1)(a) LLMC applied also to wreck removal claims as Denmark had at the time not made the reservation of Article 18 (1)(a) LLMC.

811 Selvig (2005) p.42.

the German judgment must be filed with the limitation fund instead of being enforced independently.[812]

Obviously, the first view stands on the fundamental principle of the Brussels Regime to give full authority and effectiveness to foreign judgments, whereas the second view stands on the practice and purposes of the mechanism of limitation of liability. As we know, Article 71 gives priority to specialized international conventions to the extent of the rules on jurisdiction, recognition and enforcement of foreign judgments.[813] In the *TNT/AXA* case,[814] it was further held by the ECJ that between member states, the issue of jurisdiction, recognition and enforcement of foreign judgments should follow the rules under Brussels I (now Brussels Ibis) rather than the rules under the specialized international conventions unless applying the rules under the specialized convention was at least as favourable as Brussels I (now Brussels Ibis) to facilitate the administration of justice in the EU and the free movement of judgments between member states. As it involves no specific provisions on the recognition and enforcement of foreign judgments in the general limitation conventions, it seems that a foreign liability judgment should be recognized and enforced in line with the requirements and refusal grounds under the Brussels Regime. And it also seems that the fund court should give equivalent effect to a foreign judgment in the same way as it has in the court of origin.

However, it should be borne in mind that the process of the distribution of limitation fund is similar to the insolvency proceeding.[815] The fund is similar to the assets of the bankrupt company against which claims should be made for distribution. Where a foreign liability judgment has sought recognition and enforcement before the fund court, the fund court will look at what claim underlies the judgment and the amount of the claim. Then the fund court can distribute the fund in proportion among all the qualified claims. Even though the fund court is likely to make some deduction on the amount of the claim that has been ascertained by the foreign court, it should not be considered as a review of the substance of case. Furthermore, after a limitation fund is put up, basically no other ships and other assets of the liable person can be subject to enforcement by the claimants, especially when the claimants have made their claims against the fund. If a foreign liability judgment is allowed to be enforced in its full amount, it is not fair for other competing claimants before the fund court who can only get their remedy from the fund. In the long term, this may discourage potential claimants from claiming directly from a fund court instead of initiating liability proceedings separately in different courts. In this case, the competing claimants are also entitled to be informed of all the claims that are made against

812 Windahl (2009) p.621. Smeele (2007).

813 *The Tatry* (Case C-406/92) [1994] ECR I-5439; *Nürnberger Allgemeine Versicherungs AG v Portbridge Transport International BV* (Case C-148/03) [2004] ECR I-10327. See more discussion in above 7.2.3

814 *TNT Express Nederland BV v AXA Versicherung AG* (C-533/08) [2010] ECR I-04107.

815 For example, Section 107 Insolvency Act 1986.

the fund. And they should also have the right to challenge the effect of foreign liability judgments based on the requirements and refusal grounds for the recognition of foreign judgments under the law of the fund court.

Another point which needs to be made is that,[816] given the fact that the German court did not expressly determine the issue of limitation of liability, it has been suggested that, if the German maritime authorities had made an extra claim in respect of the shipowner's right to limit or the limitation amount based on the German limitation rules for wreck removal costs and if the German judgment had made a legal assessment on these claims, the recognition and enforcement of the German judgment would definitely not be affected by the Danish limitation rules.[817] However, this view is doubtful. Under Article 15 (1) 1996 LLMC (or 1976 LLMC), the rules of the conventions become applicable only after the right to limitation of liability is invoked before the court of a contracting state. The right to limit is the optional right of the liable person.[818] The liable person is entitled to choose a jurisdiction to constitute a limitation fund and claims his right to limit. The right to limit can be invoked even after the liability judgment has been given. This is not odd as it is limitation of "liability" and it does not matter how that liability is established as long as the claim has not been paid. Limitation of liability only affects the enforcement of liability claims. Therefore, it is not feasible to deprive a liable person of their interest in limiting their liability just because a claimant has raised the issue of limitation of liability in a prior proceeding, even based on the issue preclusion doctrine,[819] the determination of the court on the right to limit of the liable person and the amount of limit between the liable person and an individual claimant could not bind other competing claimants before the fund court as they are not parties to the prior proceeding. Furthermore, there seems to be a public policy consideration that if the court with jurisdiction of an individual liability claim can decide about a person's right to limit this may easily lead to conflicting judgments and that therefore it is better if the limitation court decides this in an *erga omnes* decision.

6.3.6 Concluding remarks

The practice on the recognition of foreign judgments in limitation of liability cases shows that there are interactions between the rules on the recognition of foreign judgments and the rules on the limitation of liability.

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816 The background is that initially the German maritime authorities has made claim higher than the special limitation amount for the wreck removal costs under German law against the owner of *Uno*. Then the owner of *Uno* argued that the claim is higher than that prescribed under the German law. Therefore, the German maritime authorities reduced its claim equal to the prescribed amount.

817 Windahl (2009) p.621. The same view can be found in Selvig (2005) p.44.

818 Tettenborn and Rose (2002) para.07-021.

819 See Chapter 5 Section 5.5.2.

For one thing, recognition of foreign judgments, as shown by the practice under the Brussels Regime, can enhance the effect of certain judgments under limitation conventions. By constituting a limitation fund, the *erga omnes* effect of a limitation fund can give the liable person a better protection. However, due to the fact that states are not always following the same version of limitation conventions and some states may have reservations when ratifying the limitation conventions, the *erga omnes* effect of limitation fund is often hampered. With the assistance of the mechanism of recognition of foreign judgments, the effect of a foreign limitation fund can be transferred between member states of EU and ETFA. This follows that, after constituting a limitation fund in one state, a liable person could better enjoy the benefit of the *erga omnes* effect of the limitation fund and get protected by a limited amount against all the claims arising from the same incident, but also could seek the immunity effect of the limitation fund and use it offensively to get his ships or other assets released or seek the return of the guarantee that might happen in another state.

For another, as the right to limit is the optional right of the liable person, the right to limit must be invoked by the liable person himself. This follows that even though a claimant has obtained a favourable judgment in a court of a state, when this judgment holder seeks recognition of this judgment before the fund court in another state, the fund court where the liable person invokes the right to limit will still use limitation rules of that state to review the liability judgment, besides other refusal grounds.

6.4 Recognition of foreign judicial sales of ships

6.4.1 Introduction

As ships are valuable assets of shipowners, they are usually collateral for the repayment of loans extended to the shipowners as well as useful and easy to trace assets to enforce maritime claims. When the shipowners fail to pay creditors or claimants, the latter may seek to enforce against the ship by applying a judicial sale.

The judicial sale of a ship,[820] also known as the forced sale of a ship,[821] refers to a sale conducted or supervised by a competent judicial authority, for the satisfaction of claims enforceable against a ship. Compared with the private sale of a ship, which is merely binding upon the parties to an agreement, a judicial sale of a ship involves the power of a judicial authority. It also involves publicity as the notice of the sale should be served to the parties who have an interest in the ship within certain time. A judicial sale of a ship also concerns certain statutory procedures, such as appraisement, which must be obeyed. In a judicial sale, creditors other than the one who initiated and pursued the sale, are allowed to come forward to file their claims before the court where the judicial sale takes place. Furthermore, a notable difference between a private sale and a judicial sale of a ship is that some of the liabilities incurred in the ship's operation are enforceable upon the ship itself, such as maritime liens, and can survive a private sale but not a judicial sale. This is why the judicial sale of a ship is so important since a judgment on the judicial sale of the ship not only leads to the distribution of the proceeds of the sale of the ship over the various creditors, but also metaphorically washes the ship clean of maritime liens, ship mortgages, and all other charges attached to the ship prior to the sale and thus provides the ship purchaser with clean title. The above elements give the judicial sale of a ship an *erga omnes* effect, and the full realization of such effect requires the process of recognition of foreign judgments.

6.4.2 Recognition of foreign judicial sales of ships

6.4.2.1 From old principle to uniform rules

Rudiments of judgments on judicial sales of ships can be found in early prize cases. Prize judgments concern the judicial sale of enemy merchant vessels and cargo seized as "prize" in times of war. Such court judgments led to the previous "enemy" owner losing his title to the seized vessel or cargo and to the transfer of the title to the ship and cargo to the highest bidder at the judicial sale of the vessel and cargo.[822]

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820 This concept was used in the Draft International Convention on Foreign Judicial Sales of Ships and their Recognition, which was approved by the Assembly of the 41st International Conference of the *Comité* Maritime International (CMI), held in Hamburg on 17th June 2014. This draft instrument is now under the deliberation before the United Nation Commission of Trade Law. The original text of this instrument can be found in 'Judicial Sale of Ships: Proposed Draft Instrument Prepared by the *Comité* Maritime International', A/CN.9/WG.VI/WP.82 (13 Apr 2017) https://undocs.org/ A/CN.9/WG.VI/WP.82 accessed 18 July 2021.

821 This concept was adopted by Article 12 International Convention on Maritime Liens and Mortgages, adopted at Geneva on 6 May 1993, see also Article 10 and Article 11 International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages 1967. A comparison between the concept of judicial sales of ships and the concept of forced sales of ships can be found in Li (2009) p.342.

822 *Cammell v Sewell* 157 ER 615 (1858): "If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere."; *Castrique v Imrie* 141 ER 1222

In the 18th century, the English admiralty court had a specialized jurisdiction to enforce foreign maritime judgments, which mainly referred to foreign prize judgments.[823] Following English practice, in times of war, American admiralty courts were considered as international courts under international law,[824] and therefore these courts were bound to recognize foreign prize judgments and treat them as conclusive and binding to the world, whereas at that time courts with ordinary jurisdiction treated foreign judgments only as *prima-facie* evidence.[825] The recognition of foreign prize judgments also had great practical significance for the equally rudimentary forms of marine insurance existing at the time. The risk of a ship or cargo being seized as prize by an enemy vessel was a common risk for shipowners and merchants to insure against. As the prize judgment of the foreign enemy court had to be recognized, hull and marine cargo insurers could not deny that a vessel had been taken as prize if it was confirmed by a foreign court judgment.

Even though prize cases no longer exist, the early precedents lay the basis for the modern courts to give recognition to foreign judgments *in rem*,[826] especially in the common law countries. Foreign judicial sales of ships, from the perspective of common law, as typical judgments *in rem*, are deemed as recognizable and binding on the world.[827] However, this rule is still not universally accepted as there are still many countries that have no common law tradition. For example, the Turkish courts used to consider foreign judicial sales of Turkish ships a violation of Turkish public policy, and the effect of such a judicial sale did not lead to the cleaning of the pre-sale charges attached to the ship.[828] Furthermore, differences between the countries regarding the legal effect of a judicial sale under domestic laws have implications for the extent of recognition to be accorded to foreign judgments on judicial sales of ships. In some countries, a judicial sale extinguishes all the pre-sale encumbrances attached to the ship while in some other countries, a judicial sale will not have such a comprehensive "cleansing" effect. For example, the right of a registered leaseholder and a registered unsatisfied claim could still exist after the judicial sale.[829]

(1860): "The leading authority is *Hughes v Cornelius* 89 ER 907 (1691) (KB), where it was decided that the sentence in a foreign court of Admiralty, decreeing a ship to be lawful prize, is conclusive … This shews that a judgment *in rem* shall be held conclusive upon the title and transfer and disposition of the property itself, in whatever place the same may be found, and by whomsoever it may be questioned.".

823 Sack (1939) p.396.

824 Peterson (1972) p.225.

825 Philipps (1843) p.49-51.

826 *Pattni v Ali & Anor (Isle of Man (Staff of Government Division))* [2006] UKPC 51, see in Dicey, Morris and Collins (2016) ff.715.

827 Ibid.

828 Bleyen (2015) p.149. It should be noted that the new Turkish Commercial Code seems to take a more favourable view on the effect of foreign judicial sale of ships.

829 'Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-fifth session' A/CN.9/973 (24 May 2019) https://undocs.org/A/CN.9/973 accessed 18 July 2021, para.35.

Given the above, in 2008 the *Comité Maritime International* (hereafter: CMI)[830] instituted an international working group (IWG) to explore the possibility of unifying the law on the recognition of foreign judicial sales of ships. The overall purpose of this international legislative effort is to enhance the exterritorial effect of judicial sales of ships in respect of giving a clean title to the ship purchaser.

The research project resulted in the Draft International Convention on Foreign Judicial Sales of Ships and their Recognition (hereafter: Beijing Draft).[831] In 2017, the CMI submitted the Beijing Draft to the United Nations Commission on International Trade Law (UNCITRAL).[832] After the Beijing Draft had received support from a cross-section of the international maritime industry at a CMI colloquium in February 2018,[833] Switzerland proposed that the UNICITRAL should take action upon the topic of recognition of foreign judicial sales of ships.[834] UNICITRAL agreed to revisit the subject matter. Based on the Beijing Draft, the UNICITRAL working group has finished two rounds discussions resulting in the First Revision Draft,[835] the Second Revision Draft,[836] and the Third Revision Draft.[837] The author will use this latest Third Revision Draft as a point of reference to examine the problems concerned with and the significance of the recognition of foreign judicial sales of ships.[838]

830 The CMI has its headquarters in Antwerp, Belgium. It is the oldest organization in the world that is exclusively concerned with the unification of maritime law and related commercial practice, see in Nigel H Frawley, A Brief History https://comitemaritime.org/about-us/history/ accessed 18 July 2021.

831 The original text of this instrument can be found in 'Judicial Sale of Ships: Proposed Draft Instrument Prepared by the *Comité* Maritime International', A/CN.9/WG.VI/WP.82 (13 Apr 2017) https://undocs.org/A/CN.9/WG.VI/WP.82 accessed 18 July 2021.

832 'Proposal of the Comité Maritime International for possible future work on cross-border issues related to the Judicial sale of ships', A/CN.9/923 (13 Apr 2017) https://undocs.org/A/CN.9/923accessed 18 July 2021.

833 The colloquium held in Valletta, Malta, on 27 Feb 2018. The CMI proposal received support in this event, which includes representatives of the Baltic and International Maritime Council (BIMCO), the international Transport Works Federation (ITF) and the Federation of National Associations of Ship Brokers and Agents (FONASBA), as well as ship financiers, shipowners, bunker suppliers, ship repairers, harbour authorities and ship registries.

834 'Possible future work on cross-border issues related to the judicial sale of ships: Proposal from the Government of Switzerland' A/CN.9/944/Rev.1 (22 Jun 2018) https://undocs.org/A/CN.9/944/rev.1 accessed 18 July 2021.

835 'Draft Instrument on the Judicial Sale of Ships: Annotated First Revision of the Beijing Draft', A/CN.9/WG.VI/WP.84 (10 Sep 2019) https://undocs.org/ A/CN.9/WG.VI/WP.84 accessed 18 July 2021.

836 'Draft Instrument on the Judicial Sale of Ships: Annotated Second Revision of the Beijing Draft', A/CN.9/WG.VI/WP.87 (11 Feb 2020) https://undocs.org/A/CN.9/WG.VI/WP.87 accessed 18 July 2021.

837 'Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft', A/CN.9/WG.VI/WP.90 (9 Feb 2021)' https://undocs.org/A/CN.9/WG.VI/WP.90 accessed 18 July 2021.

838 Ibid.

6.4.2.2 The effect of judicial sales of ships under national laws

There are different views as to the legal effect of a judicial sale of a ship under national laws. One view is that after a judicial sale, not only the title is transferred to the ship purchaser, but also all charges on the ship incurred before the judicial sale are extinguished. For example, under English law, the judicial sale of a ship for the purpose of satisfaction of maritime claims, which is prescribed in Article 20(1)(a) of the Superior Court Act, can extinguish all liens and encumbrances attached to the ship prior to the sale.[839] In this case, the effect of the judicial sale of a ship can be used as a shield, protecting the ship purchaser from challenges and attacks based on the pre-sale claims against his title. In contrast, in some other jurisdictions, the judicial sale of a ship does not necessarily result in a clean title. This is particularly true in cases where a ship was attached with certain registered mortgagees or other registered rights. It has been reported that, in Belgium, Denmark, Germany and Norway, the effect of a judicial sale of a ship does not automatically extinguish all registered encumbrances on the ship and a separate act is required to give a ship a clean title, e.g. to apply to the ship registry to delete the registered rights. Specifically, under Belgian law, the mortgage should be de-registered after the judicial sale of ship to give a clean title to the ship purchaser.[840] Under German law, if the judicially-sold ship is a foreign flagged ship, the effect of the judicial sale is deemed to extinguish all charges on the ship. However, if the judicially-sold ship is a German ship, it is said that the judicial sale of a ship does not extinguish the mortgagees that are still registered in the ship registry.[841] Under Norwegian law, a judicial sale of a ship does not extinguish other registered non-monetary claims on the ship.[842]

Given the differences under national laws, the Beijing Draft initially followed the approach employed by the two earlier conventions[843] and provided for a rule of uniform law, which is of a procedural law nature and yet has substantive private law effects by determining that the judicial sale causes the listed pre-sale claims to become detached from the sold ship.[844] However, during the deliberations at UNCITRAL, the difficulties in respect of unifying the effect of judicial sale under national laws were raised and considered.

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839 The Cerro Colorado [1993] 1 Lloyd's Rep 58 (QB). See also in Mandaraka-Sheppard (2013) p.178.

840 Mbanefo (2010) p.222-23. The CMI Working Group issued a questionnaire focusing on the effect of judicial sales of ships in the member states. In total, 23 member states gave their responses to the questions.

841 Ibid.

842 Ibid.

843 Article 12(1) International Convention on Maritime Liens and Mortgages 1993 (hereinafter:1993 MLM) and Article 11(1) International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages 1967. It is provided that, "in the event of the forced sale of the vessel in a State Party, all registered mortgages, "hypothèque" or charges, except those assumed by the purchaser with the consent of the holders, and all liens and other encumbrances of whatsoever nature, shall cease to attach to the vessel … "

844 Article 6 Beijing Draft.

The drafters agreed to no longer to unify the legal effect of judicial sales of ships. Instead, they narrowed down the applicable scope of the instrument only to those judicial sales which confer clean title to the ship purchasers. Currently, the Third Revision Draft only applies to those judicial sales of ships that can extinguish all titles to or rights and interest on the ships and cease all the charges and mortgages on the ships under the law of the contracting states.[845] This way of drafting is easy to win support since it avoids making a uniform rule for the effect of judicial sales of ships, which may be an obstacle for some states to agree with. Without unifying the effect of judicial sales of ships, forum shopping is inevitable when the instrument becomes effective. States whose law explicitly grants a clean title to the ship purchaser in a judicial sale will gradually become the favoured jurisdiction for judicial sales of ships as the sale proceeds of a ship to which the purchasers obtain clean title are likely to be higher than where no clean title can be obtained.

6.4.2.3 The international effect of foreign judicial sales of ships

a Two approaches

Without the recognition of foreign judgments by other states, the legal effect of a judicial sale of a ship can only take place within the jurisdiction of the state where the court conducted the judicial sale locates. Under national laws, there are generally two approaches to justify the effect of a foreign judicial sale of a ship.

The first approach, mainly considers the effect of a foreign judicial sale of a ship as an applicable law issue. A traditional view says that the *lex rei situs*[846] determines the transfer or disposition of title of movable objects. It follows that, for a ship, as a movable object, if it is situated in the country where the judicial sale takes place, the law of that country is decisive to the transfer or disposition of title. The effect of a foreign judicial sale of a ship can be recognized as long as the ship is within the jurisdiction of that state at the time of the judicial sale. In a Dutch case,[847] where a Turkish ship had been sold by a Chinese court, the Dutch court adopted this traditional view and held that the judicial sale of the ship was in line with Chinese law and that Chinese law applied to the consequences of that sale with regard to the transfer of title of the ship. Therefore, the title was held to have been transferred to the ship purchaser even if the ship was still registered in Turkey.

However, it is still worth asking whether it is proper to apply the *lex rei situs* to determine the transfer or disposition of all kinds of property interest on a ship, including the title of a ship and other registered rights on a ship, e.g. ship mortgages, and other unregistered

845 Article 3 Third Revision Draft.

846 It is also known as *Lex loci rei sitae* (Latin for "law of the place where the property is situated") is the doctrine that the law governing the transfer of title to property is dependent upon and varies with the location of the property, for the purposes of the conflict of laws.

847 Katerina, ex Hidir Selek, Court of Amsterdam 7 May 2004, LJN: BB4789, Schip & Schade 2007, 108.

charges, e.g. maritime liens. Even though ships are movable objects, they are normally considered as having some similarities with immovables. The most far-reaching one regards the ship registration. From an international public law point of view, ship registration makes a ship subject to a specific jurisdiction for the purposes of safety regulation, security control and so on.[848] In contrast, from a private law perspective, ship registration serves as a protection to those who have an interest in the ship, such as, ship mortgagees or the holders of certain kinds of maritime liens. By registration, a movable ship could be equated to an immovable object from the perspective of ship registry. The rights to and interests in the ship could have good protection with the public records.[849] In the light of this, it is viewed that it is the law of the country of registration that should determine the transfer and disposition of registered titles and other property rights on a ship. And this rule is a justifiable exception to the traditional choice of law rule on movable objects.[850] It follows that, without conforming to the requirements of the law of the country of registration, any transfer or disposition of registered titles and property rights on a ship would be held invalid or ineffective against those who had registered their interest in a ship registry. In *Hooper v Gumm*,[851] an American ship was judicially sold before an English court when the ship was located within its jurisdiction. After the sale, the mortgagees asserted their title acquired before the sale against the ship purchaser in the English court. The English Court of Appeal held that, the effect of the judicial sale should be determined by English law but whether the mortgagees could invoke their legal title to the ship fell to be determined by the US law. The court's holding implies that it is not merely the *lex rei situs* but also the law of the country of registration that has implications on the effect of a judicial sale of a ship.

Furthermore, if the matter concerns certain unregistered liens or charges on a ship, such as maritime liens, it seems that the *lex rei situs* may not always be appropriate to dispose of the maritime liens on the ship and subsequently grant a clean title to a judicially-sold ship. Currently, countries have different views on the choice of law rules for deciding whether a claim is secured by a maritime lien. For example, under English law, the general view is that it is the *lex rei fori* that determines whether a claim is secured by a maritime lien,[852] whereas under the US law, the determination is much more complicated.[853] An American court may refer to the choice of law rules for the substantive

848 Coles and Watt (2009) para.1.21. Ship registration is also required by Article 94 United Nation Conventions on the Law of the Sea (UNCLOS).

849 Coles and Watt (2009) para.1.24.

850 Rabel (1958) ff.102, see also in Dicey, Morris and Collins (2016) ff.1300.

851 [1867] LR 2 Ch App 282.

852 *The Halcyon Isle* [1981] AC 221; *Bankers Trust International Limited v Todd Shipyards Corporation* [1980] 2 Lloyd's Rep 325. *The Ioannis Daskalelis* [1974] SCR 1248 (Supreme Court of Canada has the same view).

853 Tetley (2002) ff. 439.

claims,[854] or to typical choice-of-law theories for maritime cases,[855] or to the governmental interests analysis[856] to determine whether a claim is secured by a maritime lien. It follows that, even though a court sold a ship and held that the ship is free of any maritime liens in one country, a claimant may still hold a valid maritime lien in the view of a court of a different country.

The loopholes of the first approach are obvious. The traditional choice of law rule for movable objects, i.e. that the *lex rei situs* determines the transfer or disposition of title, is not always suitable and by no means exclusive to determine the titles and other property rights on a ship. As different countries may apply to different choice of law rules to determine the title and other property rights on a ship, it further demonstrates that a court may not recognize the effect of foreign judicial sales of ships simply because the judicial sale was conducted in accordance with the *lex rei situs*.

In contrast, in common law countries, a different approach is adopted to give effect to foreign judicial sales of ships. Following the practice of prize cases, a foreign court's judicial sale of ship is treated as a foreign judgment *in rem*. It is generally viewed that a judgment *in rem* covers a judgment in which possession of property in a thing is adjudged to a person, or the sale of a thing is decreed in satisfaction of a claim against the thing itself.[857] Before giving recognition to the judgments *in rem*, it is required that the ship should be within the jurisdiction of the court. The House of Lords has also held that where the ship is physically within the jurisdiction of the court, this court has the jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing. And in this case, the court's determination "whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer or other act, will be held valid in every other country where the question comes before any other foreign tribunal", and "the adjudication is conclusive against the world."[858]

b Requirements of the second approach

The Third Revision Draft basically follows the second approach to give extraterritorial effect to foreign judicial sales of ships by employing the rules of recognition of foreign

854 *Ocean Ship Supply v The Leah* 729 F 2d 971 (4th Cir 1984).

855 *Lauritzen v Larsen* 345 U S 571 (1953); *Romero v International Terminal Operating Co* 358 U S 354 (1959); *Hellenic Lines, Ltd v Rhoditis* 398 U S 306 (1970). The U.S. Supreme Court established eight factors that can be applied to determine the applicable law in American maritime cases. The factors are: place of the wrongful act, law of the flag, allegiance or domicile of the injured party, allegiance of the shipowner, place of the contract, inaccessibility of the foreign forum, law of the forum, and shipowner's base of operations.

856 *Exxon Corp v Central Gulf Lines* 707 F Supp 155 (S D N Y 1989).

857 Dicey, Morris and Collins (2016) ff.716.

858 *Castrique v Imrie* (1870) LR 7 HL (Blackburn J).

judgments. There are two requirements for the effect of a foreign judicial sale to be recognized by other states, i.e. the jurisdiction[859] and the notice of the proceeding.[860]

In fact, the jurisdiction requirement required by the second approach implies that it is the law of the country where the ship is actually situated at the time of the judicial sale which is proper to determine the transfer and disposition of title.[861] Practically speaking, this jurisdiction requirement is easy to satisfy, since for practical purposes, a court may only order a judicial sale of a ship if the ship is under the control of the court.[862] In doing so, the court or other judicial authorities that actually engage in a ship sale can make some preparations for the sale, such as hiring a surveyor to inspect the ship's condition or give an appraisement of the ship to be sold.

In an extreme case, the extraterritorial effect of a judicial sale of a ship can be granted even though the ship is not located within the jurisdiction of a state where the judicial sale is conducted. For example, in *The Otapan* case,[863] the ship was owned by a Mexican shipping company Mavimin which in 1999 put the ship up for disposal when it was lying in Amsterdam. In 2001, the members of the crew were caught illegally and dangerously removing asbestos from the ship. Therefore, the Dutch government seized and confiscated the ship and became the owner of the ship. As the ship was full of asbestos on board, the Dutch government made itself liable for the expensive ship cleaning costs. The turning point of the case came in 2005. The previous Mexican shipowner was declared bankrupt, which was followed a judicial sale in Mexico of the ship *Otapan*, which at the time was located in the Netherlands. The new buyer was a Turkish company. The Dutch government chose to respect the effect of the Mexican judgment on the judicial sale of *Otapan* in order not to be liable for the huge costs, despite that during the judicial sale the ship was not located within Mexico. It served the government's self-interests to recognize the effect of the foreign judicial sale by another state even though the court which conducted the judicial sale had no physical control of the ship. Obviously, it is not necessary for the Second Revision Draft to include this exceptional situation into its scope.

Besides the requirement of jurisdiction, the second approach concerns a requirement of notice. In early case law, there was no such requirement of notice in giving recognition

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859 Article 3(1)(a) Third Revision Draft.

860 To address the importance of this extraterritorial effect of judicial sale, from the Second Revision Draft, the Title of Article 6 was changed to "international effects of a judicial sale", and provides generally two main requirements, i.e. jurisdiction requirement and notice requirement.

861 Ibid.

862 For example, under 9.1 Practical Direction Supplements Civil Procedure Rules Part 61- Admiralty Claims, it provides that, "any application to the court concerning- (1) the sale of the property under the arrest … "

863 The details of the case can be found in Colin De La Rue, Shipping and the Environment, (2nd edn, 2009) ff.1026, see also in Case No. 200606331/1 (Administrative Jurisdiction Division of the Council of State) https://ec.europa.eu/environment/waste/ships/pdf/otapan.pdf accessed 18 July 2021.

to a foreign judgment in *rem*. The justification for this lies in the fact that the law assumes that the property is in the possession of the person interested,[864] and that the court's physical power over the property provides sufficient notice to these persons and precludes them from subsequent attacks on the validity of the judgment.[865] In *The Mary*,[866] a foreign prize case, the court held that the notice of the seizure of the ship was constructive notice to the persons who have an interest in the ship, namely the shipowner.[867]

In *Zimmern Coal v Coal Trading*,[868] a ship was judicially sold in Rotterdam and was considered sold free of any liens. A ship supplier sought to enforce a maritime lien against the ship before an American court. The District Court disregarded whether the shipowner and the holder of maritime lien were informed of the proceedings, and held that, the Dutch court's jurisdiction was given by law to seize the ship and transfer the title to the purchaser free of liens, so the judicial sale of the ship by the Dutch court was a valid judgment. The justification for the failure to notify the holder of maritime lien lies in that, if the maritime lien was not required to be registered, it was in practice very difficult for the court, where the judicial sale is conducted, to inform this creditor personally.

In modern times, the lack of notice to interested persons may cause gross injustice. A good example is the notice to the ship mortgagees. Ships are valuable assets of the shipowners, which may be subject to multiple mortgages, and which are usually required to be registered. A mortgagee, normally a bank, has substantial interests in the ship. In this scenario, the notice to interested persons is far more important. If the ship is sold without informing the mortgagees and the judicial sale results in the loss of any charges on the ship, in the long run, no banks would be willing to finance the shipping industry. For the same reason, in the Third Revision Draft, the bareboat charterer was added to the scope of persons that should be given notice,[869] as in some jurisdictions, they are holders of registered charges.[870]

Following the second approach, the Third Revision Draft provides that, a ship should be physically present within the jurisdiction of the state where the judicial sale took place in order to have an extraterritorial effect. Moreover, notice is required to be served to a list of parties. Apart from notice to the parties who have registered interests on the ship, such as, the shipowner, the registered mortgagees or the holders of other registered charges, the registered bareboat charterer, the holder of maritime liens should also be served,

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864 *Pennoyer v Neff* 95 U S 714, 727 (1877).
865 *Zimmern Coal Co. v Coal Trading Ass'n of Rotterdam, the Netherlands* 30 F 2d 933, 934 (5th Cir 1929).
866 *The Mary* 13 U S 126 (1815).
867 Ibid.
868 30 F 2d 933 (1929).
869 Article 4 (1)(e) Third Revision Draft. This is also provided in Article 4 (1)(e) Second Revision Draft.
870 'Report of Working Group VI on the work of its thirty-sixth session', A/CN.9/1007 (18-22 November 2019) https://undocs.org/ A/CN.9/1007 accessed 18 July 2021, para.63.

provided that the court where the judicial sale will take place has received notice of the claim.[871] Considering the practical needs, the notice of the judicial sale is required to be given to the ship registry, and the registry where the ship may have a bareboat registration. As for these two registries, the notice to them is only for the convenience of deregistration of the ship after the sale, not for the fairness of the proceedings. Therefore, it is submitted that a lack of notice to these two parties should not be an excuse to defeat the effect of a foreign judicial sale of a ship.

6.4.2.4 The effect of recognition of foreign judicial sales of ships

Based on the above two requirements, the ship purchaser can seek recognition of the effect of judicial sales of ships to protect their interest in several ways.

First, the recognition of foreign judicial sales of ships can secure the clean title of the ship purchaser free from repetitive intervening arrests of ships based on pre-sale claims. Even though a judicial sale is said to confer a clean title to the ship purchaser and to wash away all encumbrances previously attached to the ship in many jurisdictions, the effect of such a judicial sale is meaningless without the recognition by courts in other countries. In that case the previous shipowner or the claimants who had privileged rights in the ship before the sale, such as the holders of maritime liens, the mortgagees, etc., may ignore the binding effect of the judicial sale in the foreign court and apply to arrest the sold ship in different jurisdictions for the purpose of challenging the ownership of the ship purchaser or of enforcing their claims directly against the ship. These intervening arrests are troublesome for the ship purchaser and the whole shipping industry. Unless the ship purchaser can be granted a clean title free from any encumbrances, in the long run, potential investors may feel reluctant to purchase ships and participate in ship finance. For example, in *Goldfishing Shipping v HSH*,[872] a Turkish-flagged ship was judicially sold before an American court by a bank. At the judicial sale, Goldfish purchased the ship and received a bill of sale from the U.S. Marshal. Then Goldfish re-registered the vessel in Panama and it sailed with a cargo to the Mediterranean. Upon arrival there, the previous Turkish owner repeatedly sought to arrest the ship at ports in Spain and Italy, as he claimed that he was still the owner of the ship according to the Turkish ship registry. In this scenario, the Third Revision Draft entitles the ship purchaser to seek recognition of the judicial sale to use it as a shield to protect the ship and its purchaser from unpleasant arrests based on pre-sale claims.[873] If the ship has been arrested based on any type of pre-sale claim, the ship purchaser

871 Article 4 Third Revision Draft.

872 *Goldfish Shipping, SA v HSH Nordbank AG* 2010 AMC 1210 (3rd Cir 2010).

873 Article 8(1) Third Revision Draft.

can use the foreign judgment on judicial sale as a sword to challenge the arrest and ask the court to release the ship from arrest.[874]

Clearly, the effect of foreign judicial sales of ships in preventing subsequent arrest based on pre-sale claims is enhanced by Article 8(4) Third Revision Draft. Based on this provision, contracting states should always recognize the effect of judicial sales in other contracting states and protect the ship purchaser from intervening arrest unless the application for dismissing the arrest or ordering the release of the ship are manifestly contrary to the public policy of the state. It was observed that if the application for arrest after the sale could be limited, it means that a new judicial sale might take place and that there will be multiple certificates of judicial sale for the same ship.[875] Nevertheless, it should be noted that the understanding of the term "manifestly contrary to public policy" depends on the court where the ship arrest is sought. Even though in some jurisdictions, the "manifestly contrary to public policy" is a high threshold, such as the practice between EU member states under Brussels Ibis,[876] it may not be the case in some other jurisdictions. For example, in previous Turkish practice,[877] the Turkish court held that a judicial sale of a Turkish ship by a foreign court itself constitutes a violation of Turkish public policy. Therefore, the inclusion of the public policy exception in Article 8 (4) means that the effect of recognition of foreign judicial sales of ships in order to prevent of intervening arrests, would be discretionary.

Second, the Third Revision Draft imposes an obligation upon administrative bodies, i.e. the ship registry. In the previous practice, the registration authority usually poses an obstacle to the clean title of the ship purchaser. As ships always move from country to country and it is common practice to register a ship in a state of flag of convenience, such as Panama, the country where the judicial sale is conducted is less likely to be the one where the ship is registered. This means that, even though the law of the state where the judicial sale was conducted grant the ship a clean title and frees it from any encumbrances, registrations in the ship registry are not automatically affected. Also, undeleted registrations might also provide a good excuse for the previous shipowner and the holders of the registered rights to challenge the effect of judicial sales of the ships. In *Galaxias*,[878] a Greek registered ship, the *Galaxias*, was arrested in Canada. Before the Canadian court, several claims were made against the ship, including a claim supported by a registered lien for seafarer's wages from the Greek Seamen's Union. Then *The Galaxias* was judicially sold in Canada. According to the order of the court, the ship was free and clear of all

874 Article 8(2) Third Revision Draft.

875 'Report of Working Group VI on the work of its thirty-sixth session', A/CN.9/1007 (18-22 November 2019) https://undocs.org/ A/CN.9/1007 accessed 18 July 2021, para.88.

876 See Chapter 2 Section 2.6.1 and 2.8.1.

877 Footnote 125.

878 *Krochenski v The ship Galaxias* 1989 AMC 348 (Federal Court, Trial Division).

encumbrances. However, the Greek registry refused to delete the registration of the lien as it was contingent on the satisfaction of the claims raised by the Greek Seamen's Union.[879] Therefore, it is hard to say that the ship purchaser has obtained a free and clean title from the perspective of the law of the state of ship registration. The above examples show that, without the cooperation of the ship registry, it will not be easy for a ship purchaser to re-register the ship in his preferred ship registry, as the precondition for a new entry of a second-hand ship is normally a proof of deregistration from its previous registry.[880]

Given this, the Third Revision Draft innovatively makes a connection between the court's decision on the judicial sales of ships and the ship registry. It is required by the Third Revision Draft that the ship registry needs to grant a special form of recognition in the way of deleting the previous entries or adding a new entry, to preserve the full effect of a foreign judicial sale of a ship. Unlike the recognition of foreign judgments that we usually refer to, the recognition in this case is performed by administrative bodies not by the court. In this case, the recognition of foreign judicial sales by the ship registry involves some acts to change the *status quo*, such as de-registering all the registered rights attached to the ship, and re-registering the new title.

Despite the above, the obligation of the ship registry is not unconditional. In the Second Revision Draft, it provides that the ship registry can refuse to give effect to foreign judicial sales of ships where the interested parties raise challenges based on the grounds of jurisdiction of the foreign court, fraud or public policy exception.[881] However, this raises new questions as to whether these exceptions to recognition cause a heavy burden for the ship registry to go into the merits of the foreign judicial sales and whether the ship registry is competent to review the effect of foreign judicial sales of ships.[882] In the latest Third Revision Draft, the ship registry can only apply public policy to refuse to give effect to a judicial sale.[883] It is submitted that, compared with the Second Revision Draft, the amended provision in Third Revision Draft regarding the exceptions for the ship registries to avoid their obligation to recognition of foreign judicial sales is closer to the ultimate goal of the original Beijing Draft, which will enhance the function of ship registry to de-register and re-register the titles for the interests of the ship purchaser.

Even though the effect of foreign judicial sales of ships is quite practical for the parties, it still should be admitted that, the arrangements under the Third Revision Draft pose many challenges for national laws on ship registration. As the jurisdiction requirement implies the view that it is the law of the state where the ship is physically situated that

879 Ibid.
880 Bleyen (2015) p.60.
881 Article 7(5) Second Revision Draft.
882 'Report of Working Group VI on the work of its thirty-sixth session', A/CN.9/1007 (18-22 November 2019) https://undocs.org/ A/CN.9/1007 accessed 18 July 2021, para.89.
883 Article 7(5) Third Revision Draft.

determines the transfer and disposition of title, it inevitably conflicts with the view that the registration and de-registration of title and other interests basically follow the law of the state of ship registry.[884] In *Dornoch Ltd v Westminster International BV*,[885] even though the English court held that it is the law of the actual situs of the ship that governs the transfer and disposition of title of the ship, it did not deny the role of the law of the ship registry in determining the questions as to the existence of legal titles that depend on registration.[886] Moreover, under national laws the deletion of registered rights is normally based on the agreement of the creditor and the shipowner,[887] while the Third Revision Draft allows the deletion of titles and interest merely upon the application of the ship purchaser,[888] this difference may cause much practical difficulty in the future implementation of the instrument.

6.4.3 Refusal grounds for the recognition of foreign judicial sales of ships

Similar to other specialized rules for recognition of foreign judgments, the Third Revision Draft also contains refusal grounds for the recognition of foreign judicial sales of ships,[889] however, so far it has not reached a final agreement as to what refusal grounds should be included. Compared with the original Beijing Draft, the Second Revision Draft added a separate ground of fraud.[890] However, in the Third Revision Draft, the ground of jurisdiction and the ground of fraud are both deleted. This approach is in line with the general idea of this draft instrument that the *erga omnes* effect of foreign judicial sales of ships should be recognized as much as possible and that the effect of a judicial sale should exclusively be challenged in the court which judicially sold the ship.[891]

884 Bleyen (2015) p.157.

885 [2009] 2 Lloyd's Rep 191 (QB).

886 Ibid.

887 Bleyen (2015) p.157.

888 Article 7 Third Revision Draft.

889 The refusal grounds under Article 10 Third Revision Draft are separate from the grounds that can be raised against the recognition of foreign judicial sales of ships by the ship registry in Article 7 and the grounds that can be raised against the recognition of foreign judicial sales of ships by the court addressed in terms of precluding intervening arrests in Article 8.

890 A judicial sale of a ship shall not have the effect provided in article 6 in a State Party other than State of judicial sale if [, on application by a person specified in paragraph 2,] a court in that other State Party determines that: [(a) The ship was not physically within the jurisdiction of the State of judicial sale at the time of the sale;] [(b) The sale was procured by fraud committed by the purchaser; or] (c) That effect would be manifestly contrary to the public policy of that other State Party.

891 Article 9(1) Third Draft.

6.4.3.1 A final judgment?

Initially, the Beijing Draft provided that if a foreign judgment on the judicial sale of a ship has already been nullified by the court of origin in a judgment no longer subject to appeal, there is no basis for recognition.[892] In the Third Revision Draft, the above situation is not included as a basis for refusal in Article 10. Instead, the drafters have made a separate provision to regulate this point in Article 9.[893] It is submitted that the interested parties may still invoke this basis to defeat the effect of a foreign judicial sale.

As the judgment subject to appeal neither results in a ceasing of the effect of the judicial sale in Article 9, nor is included in the refusal grounds in Article 10, it can be inferred that a court in a contracting state has the duty to recognize a judicial sale judgment even if it is subject to appeal. Only if an appeal is lodged and the court of origin suspends the effect of the judgment can the court addressed refuse recognition of the judicial sale judgment. In this connection, it is consistent with the rules for the recognition of foreign judgments in general. As discussed above,[894] under English and the US law, foreign judgments subject to appeal can still be recognized, even though a stay or suspension may be ordered.

6.4.3.2 Jurisdiction of the foreign court that conducted the judicial sale

The court where recognition of foreign judicial sale is sought is entitled to examine the jurisdiction of the court where the judicial sale was conducted. It provides that only the court of the state within which the ship was physically located has jurisdiction to conduct a judicial sale with recognizable international effect. If the jurisdiction of the foreign court is not satisfied, the effect of the foreign judicial sale should be refused.

In this connection, the Second Revision Draft has made an important change on the original text of the Beijing Draft. In the latter, the jurisdiction requirement does not necessarily lead to refusal of recognition of foreign judgment,[895] which means that even though the jurisdiction requirement is not satisfied, the court may still give recognition to the foreign judicial sale of ships. However, in the Second Revision Draft, the satisfaction of the jurisdiction requirement is of an imperative character.[896] As mentioned above, based on national practice, the recognition of a foreign judicial sale of a ship may not require

892 Article 8 (2)(b) Beijing Draft. "Recognition of a Judicial Sale may be refused … (b) by a Court of a State Party, at the request of an Interested Person, if that Interested Person furnishes to the Court proof that the competent Court of the State of Judicial Sale in a judgment or similar judicial document no longer subject to appeal has subsequently nullified the Judicial Sale and its effects, either after suspension or without suspension of the legal effect of the Judicial Sale."

893 Article 9(3) Third Revision Draft. "A judicial sale of a ship shall [not have][cease to have] the effect provided in article 6 in a State Party if the sale is avoided in the State of judicial sale by a court exercising jurisdiction under paragraph 1 by a judgment that is no longer subject to appeal in that State."

894 See Chapter 2 Section 2.4.2 and 2.4.3.

895 Article 8 (a) Beijing Draft.

896 Article 10(1)(a) Second Revision Draft.

that the ship is within the jurisdiction of the state where the judicial sale takes place.[897] However, the effect of such a foreign judicial sale cannot be recognized based on the Second Revision Draft.

Notably, in the Third Revision Draft, the ground of jurisdiction was deleted. This approach is quite similar to Brussels Ibis, where the ground of jurisdiction can only be invoked to refuse recognition of foreign judgments except for several situation.[898] It is submitted that, the deletion of the ground of jurisdiction may not only eliminate the possibility that the international effect of foreign judicial sales of ships is to be challenged, but also serve the goal of the Third Revision Draft as to enhance the recognition of the effect of foreign judicial sales of ships between the contracting states.

6.4.3.4 Fraud

In the original Beijing Draft, there was no basis for refusal on the ground of fraud. However, it was later suggested that fraud should be added as grounds for refusal based on the practice under national law and international instruments relating to the recognition of foreign judgments.[899] It has also been suggested that the grounds of fraud under the Second Revision Draft should cover both substantive and procedural fraud. And the fraud that can be used to defeat a foreign judicial sale should only focus fraud in relation to the judicial sale itself and committed by the ship purchaser.[900]

As discussed in the Chapter 2, the understanding of fraud varies from jurisdiction to jurisdiction. Under English law, a judgment debtor can easily employ fraud to defeat a foreign judgment,[901] while under the US law, it is generally accepted that only fraud in relation to procedural unfairness could defeat a foreign judgment.[902] Under Brussels Ibis, the scope of fraud is much stricter since it falls within the concept of public policy, which should be strictly interpreted in order not to impede the free movement of judgments within the framework.[903] The inclusion of this new refusal ground of fraud under the Second Revision Draft not only leads to more uncertainty about the binding effect of a foreign judicial sale of a ship, but also more chances for the interested parties to challenge the effect of a foreign judicial sale of a ship. Without a uniform interpretation of this

897 *The Otapan* case, see The detail s of the case can be found in Colin De La Rue, Shipping and the Environment, (2nd edn, 2009) ff.1026, see also in Case No. 200606331/1 (Administrative Jurisdiction Division of the Council of State) https://ec.europa.eu/environment/waste/ships/pdf/otapan.pdf accessed 18 July 2021.

898 Article 45 Brussels Ibis.

899 'Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-fifth session' A/CN.9/973 (24 May 2019) https://undocs.org/A/CN.9/973 accessed 18 July 2021, para.63.

900 'Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-fifth session' A/CN.9/973 (24 May 2019) https://undocs.org/A/CN.9/973 accessed 18 July 2021, para.63.

901 See Chapter 2 Section 2.7.2.

902 See Chapter 2 Section 2.7.3.

903 See Chapter 2 Section 2.7.1.

concept, national courts may follow their own theories to determine the meaning of this basis of refusal. Apart from the questions of legal certainty and uniform interpretation, it is also viewed that the court of the state where the judicial sale is conducted is the best place to consider where the judicial sale involves fraud.[904] Probably based on the above considerations, in the Third Revision Draft the ground of fraud is also deleted.[905]

6.4.3.5 Public policy

In line with the rules for the recognition of foreign monetary judgments, the Third Revision Draft provides that the effect of foreign judicial sales of ships will be refused if it manifestly contradicts the public policy of the court addressed.[906] Regarding the meaning of the public policy exception under the Third Revision Draft, there is little evidences in the *travaux preparatoires*. Therefore, it leaves much room for courts in contracting states to interpret this concept as they see fit. The Third Revision Draft adopts a similar approach as the Brussels Ibis by using the qualifier "manifestly" to limit the scope of public policy exception. It has been suggested that, the use of the word "manifestly" can narrow down the public policy exception as much as possible in order to prevent courts in other states from using this open norm as a way to review the substance of the matter.[907] The qualifier "manifestly" also means that there is a burden of proof on the judgment debtor who wants to challenge the effect of a foreign judicial sale, mere allegation of procedural improprieties or unfairness is not enough to defeat a foreign judicial sale.

Compared with the refusal grounds included in the national and multilateral rules on the recognition of foreign judgments, the refusal grounds in the Third Revision Draft are quite limited. Not only the ground of jurisdiction and the ground of fraud has been removed, but it also does not include separate refusal grounds in relation to the service and notice of the proceeding. In fact, during the drafting of the Beijing Draft, it was proposed that recognition of the foreign judicial sale of a ship could be refused if the proceedings of the judicial sale were not accomplished in accordance with the law of the court of origin or the provisions of the Convention, by which a party could be allowed to challenge the effect of a foreign judicial sale when the court which conducted the judicial sale did not give proper notice. However, considering the purposes of this uniform instrument, it was suggested that this proposal means that "even a very minor defect

904 'Draft Instrument on the Judicial Sale of Ships: Annotated Second Revision of the Beijing Draft', A/CN.9/WG.VI/WP.87 (11 Feb 2020) https://undocs.org/A/CN.9/WG.VI/WP.87 accessed 18 July 2021, p.12.
905 Article 10 Third Revision Draft.
906 Article 10 Third Revision Draft.
907 Smeele (2013) p.192.

concerning the proceedings" may result in a complete refusal of recognition.[908] Therefore, in the Beijing Draft, there are no grounds on the defects of foreign proceedings, including the failure of notice of the judicial sale.

In the deliberations before UNCITRAL, it has also been proposed that the non-compliance with notice requirements should be grounds for refusal.[909] However, from the current text of the Third Revision Draft, it can be found that there were no particular grounds on the procedural defects of the foreign proceedings, as it was observed that a serious failure to notify could trigger the public policy grounds Therefore, if a party wants to challenge the effect of a foreign judicial sale of a ship due to a failure in the service process or the lack of notice to the interested parties, he can still rely on the public policy exception to defeat the judgment.

6.4.4 Concluding remarks

The judicial sale of a ship can result in a clean title for the ship purchaser. However, without the recognition of foreign judicial sales of ships, the so-called clean title acquired at the judicial sale by the ship purchaser is difficult to fully realize and a judicially-sold ship is still exposed to potential arrests by former creditors and previous owners. Given the practical necessity, a specialized international instrument was drafted to enhance the recognition of foreign judicial sales of ships.

On the one hand, recognition of the effect of a foreign judicial sale of a ship means that a court should preclude intervening arrests of the ship that are sought by creditors of pre-sale claims and previous owners of the ship, or release a ship that has been arrested. In this way, the interests of all involved parties in maritime trade, including cargo interests, financing banks, insurers and others are secured. On the other hand, recognition of the effect of a foreign judicial sale of a ship by the ship registry means that the ship registry needs to assist the de-registration of previously-registered titles and rights to the ship and re-registration of the title of the ship. This would help the ship purchaser to re-register the title of the ship.

Compared with the general practice on recognition of foreign judgments, the uniqueness of the practice on the recognition of foreign judicial sales of ships lies in that administrative bodies, i.e. the ship registries, can be required to give recognition to a foreign judgment. Furthermore, in line with the general rules on recognition of foreign judgments under national laws and multilateral rules, the uniform rules on the recognition of foreign judicial

908 'Commentary on the Second Draft of the Instrument on International Recognition of Foreign Judicial Sales of Ships', *CMI Yearbook 2011-2012*, 130.

909 'Report of Working Group VI on the work of its thirty-sixth session', A/CN.9/1007 (2 December 2019) https://undocs.org/A/CN.9/1007 accessed 18 July 2021, para.85.

sales of ships also concern particular refusal grounds. In enhancing the effect of recognition of a foreign judicial sale in terms of precluding intervening arrests against the sold ship, a court of a contracting state could only invoke the public policy exception to defeat the effect of a foreign judicial sale of a ship.[910] In contrast, a party is allowed to invoke all the three listed refusal grounds to avoid the recognition of foreign judicial sales of ships before a ship registry.[911]

The Third Revision Draft does structure a specialized framework for the recognition of the effect of foreign judicial sales of ships. From its long journey of drafting and deliberation, it not only demonstrates the significance of recognition of foreign judgments on judicial sales of ships by courts and by administrative bodies in the international shipping practice, but also shows that even for a particular type of judgments, a world-wide acceptance of uniform rules for their recognition is not easy.

6.5 Conclusion

With the assistance of the regime of recognition of foreign judgments, the effect of maritime judgments, either final or provisional, is enhanced. In cases concerning ship arrest, the recognition of a foreign ship arrest order could provide certain protection to a shipowner from a re-arrest of the ship or other ships that he owns. And even in cases where a prior arrest is denied, it is also possible for the shipowner to seek the recognition of the arrest denial to preclude a repetitive arrest application. In cases concerning limitation of liability, the recognition of a foreign order on the constitution of limitation fund can be sought before a court to preclude a further arrest of ship or attachment on the assets of the liable person. And if the arrest or attachment has been executed, the liable party may seek an order to release the ship or assets. In cases concerning foreign judicial sales of ships, the recognition of the effect of a foreign judicial sale of a ship means that the court addressed should preclude all the intervening arrests based on the pre-sale claims by former creditors or by the previous owner. And if the ship has been arrested based on pre-sale claims or the title of the previous owner, the court should order the release of the ship. The above cases all illustrate the function of recognition of foreign judgments to preserve the legal effect of a foreign judgment that has been ascertained by a foreign court. By making use of the tool of recognition of foreign judgments, a party is entitled to request the court addressed to preclude all intervening acts that may affect the legal effect of the foreign judgment. And when the legal effect of the foreign judgment has been affected by certain acts, the party is entitled to request the court addressed to restore the *status quo ante*.

910 Article 8 (4) Second Revision Draft.
911 Article 7 (5) Second Revision Draft.

Beyond the above, when recognition of foreign judgments encounters certain maritime rules and the shipping practice, the concept of recognition of foreign judgments seems to have more variations of which the meaning is expanding. For example, in cases concerning the recognition of foreign liability judgments by a fund court, a fund court may consider the local limitation rules to decide to what extent a foreign liability judgment should be recognized in order to distribute the fund in proportion between the creditors. In cases of the recognition of foreign judicial sales of ships, recognition of foreign judgments not only refers to the court's recognition, but also the recognition by administrative bodies, i.e. ship registries, namely in the way of deregistration and re-registration, to guarantee the clean title of the ship purchaser.

7 Procedures for the Recognition of Foreign Judgments – with a Focus on Maritime Judgments

7.1 Introduction

Where a party seeks recognition of a foreign judgment in the court addressed for preserving the acquired rights contained in the foreign judgment,[912] or for enforcing the judgment,[913] an independent proceeding is normally required. This means that a judgment creditor needs to deal with some procedural matters as well, *inter alia*, how to initiate the procedure and where to initiate the procedure. These procedural matters are important as they determine whether the rights and interests of the judgment creditors can be realized timely and efficiently.

As we know, Brussels Ibis, as a uniform regional framework, does not exclude any maritime matters as other international instruments, such as the Convention of 30 June 2005 on the Choice of Court Agreements and the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Does this mean that the procedure for the recognition of maritime judgments does not have any peculiarities? Furthermore, concerning England and Wales and the US as two important jurisdictions with maritime traditions, do they provide any specialized procedures for the recognition and enforcement of foreign maritime judgments? And how do these rules work?

To further explore the mechanism for the recognition of foreign judgments, the discussion in this chapter will first cover the general procedures for recognition of foreign judgments in the selected jurisdictions, and then to the particular maritime practice.

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912 See above Chapter 6, there are several cases in maritime law only concerns the recognition of the acquired rights and without the need of enforcement. For example, the recognition of the foreign judgment on the establishment of limitation fund.

913 If the purpose of recognition of a foreign judgment is to seek the preclusive effect of a foreign judgment, no separate proceeding is required, and the recognition of foreign judgments is normally raised by way of raising a counter-claim or a defence. For example, Section 8(1) 1933 Act provides that, a foreign judgment "shall be recognized in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in any such proceedings". Similarly, Section 6 (b) 2005 Act provides that, "if recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim, or affirmative defence."; § 482 Comment a, Restatement (Fourth) of the Foreign Relations Law (2018).

7.2 Brussels Ibis

7.2.1 General procedures for the recognition of foreign judgments

Under Brussels Ibis, if a judgment creditor only seeks recognition of a foreign judgment without enforcement, he can simply raise the judgment before the court addressed,[914] with a copy of the judgment and the required certificate.[915] If a judgment creditor also seeks recognition of a foreign judgment for the purpose of enforcing the judgment in the court addressed, the procedure before the entering into force of Brussels Ibis is less efficient. In Brussels I and Brussels Convention 1968, it concerned an intermediate procedure, in which a judgment creditor must apply for a declaration of the enforceability of a foreign judgment in the court addressed based on the required formalities.[916] However, this process was deemed as "an exponent of national sovereignty and the exercise of state power in the area of forced execution".[917]

In order to enhance the efficiency of enforcement of foreign judgments between EU member states, at the European Council meeting in Tampere 1999,[918] it was decided that the abolition of intermediate procedures for the enforcement of foreign judgments could start with "small consumer or commercial claims and for certain judgements in the field of family litigation".[919] In the 2010 Stockholm Programme,[920] the European Council considered the abolition of all intermediate procedures for enforcement of foreign judgments regarding all civil matters. The European Council invited the Commission to assess which safeguards were needed to accompany the abolition of intermediate procedures and how these could be streamlined.[921] Against this backdrop, the Commission issued the consultative Green Paper[922] to the public to inquire whether it is possible to abolish the declaration of enforceability procedure in civil and commercial matters generally and what should be the safeguards.[923] Later, in 2010, the abolition of the intermediate procedure was

914 Article 36 (1) Brussels Ibis.
915 Article 37 Brussels Ibis.
916 Article 38 Brussels I.
917 Kramer (2013) p.346.
918 Part B VI of the Tampere European Council, 15 and 16 October 1999 Presidency Conclusions.
919 Ibid.
920 The Stockholm Programme – An open and secure Europe serving and protecting the citizen (OJ, 2010) C 115/01.
921 Ibid.
922 The Green Paper on the review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM (2009) 175.
923 Ibid.

proposed by the Commission, but with two exceptions, i.e. defamation cases and judgments from collective compensatory proceedings.[924]

Eventually, Article 39 Brussels Ibis formally abolishes the procedure of declaration of enforceability without any exceptions. According to Article 42, a judgment creditor now can directly apply for enforcement of a foreign judgment before a competent enforcement authority and accompanied with a copy of the judgment and required certificate.[925]

7.2.2 Jurisdiction requirements for the application of enforcement

Although it is a fundamental principle of Brussels Ibis that judgments from a member state must be enforced in another member states efficiently, it is not clear whether there are limits on the scope of jurisdictions where enforcement can be sought.

Initially, the Brussels Convention 1968 provided that the enforcement jurisdiction is the place of domicile of the party against whom enforcement is sought.[926] If the place of domicile is different from that of enforcement, the latter prevails. However, under Brussels I, there was no priority between the place of domicile and that of enforcement any more. It only provides that, the local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought or to the place of enforcement.[927] Therefore, it is suggested that the enforcement jurisdiction under Brussels I is entirely at the applicant's discretion.[928]

By comparison, in Brussels Ibis, the wording of "the place of domicile of the party against whom enforcement is sought" and "the place of enforcement" were both deleted.[929] Nevertheless, as Article 41(1) provides that Brussels Ibis refers to the procedural law of the court addressed for the rules about enforcement, and it also provides that the court addressed must treat the foreign judgment in the same way as it would treat a judgment from the court addressed. Therefore, it can be argued that, if under the law of the court

924 Proposal for a Regulation of the European Parliament and of the Council on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) COM (2010) 748 final.

925 Article 42 Brussels Ibis.

926 Article 32(2) Brussels Ibis provides that, "the jurisdiction of local courts shall be determined by reference to the place of domicile of the party against whom enforcement is sought. If he is not domiciled in the State in which enforcement is sought, it shall be determined by reference to the place of enforcement."

927 Article 39 Brussels I provides, "1. The application shall be submitted to the court or competent authority indicated in the list in Annex II. 2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement."

928 Kerameus (2007) p.649.

929 Since the term "the place of domicile of the party against whom enforcement is sought "and "the place of enforcement" are suggested to have autonomous interpretation under Brussels I, see in Kerameus (2007) p.641, such deletion might decrease the uncertainty and ambiguity in understanding of the rules.

addressed there were certain jurisdiction limits for the enforcement of domestic judgments, the limits may also be employed when enforcement of foreign judgments is sought.

7.2.3 Coordination with international maritime conventions

Several international maritime conventions contain specialized jurisdiction rules and standard provisions on recognition and enforcement of foreign judgments.[930] This raises the question of whether and to what extent the jurisdiction rules under the international maritime conventions could serve as a legal basis for the recognition and enforcement of judgments between EU member states. And whether between EU member states, the procedure for recognition of foreign judgments, as prescribed under Brussels Ibis, is exclusive.

7.2.3.1 Article 71 Brussels Ibis and the pre-Brussels I maritime conventions

Given the fact many international conventions contain rules on jurisdiction, recognition and enforcement of foreign judgments, Article 71(1) Brussels Ibis echoes the same wording as Article 71 Brussels I and provides that the Regulation will not affect the application of any conventions to which EU member states are parties and which also govern the jurisdiction and the recognition and enforcement of foreign judgments.

The coming into force of Brussels I is a watershed, as Brussels I made the rules on jurisdiction, recognition and enforcement become the common rules of the EU, and from then on the member states no longer have competence to individually sign any international agreement that may affect these common rules.[931] Therefore, Article 71 Brussels Ibis (also Article 71 Brussels I) only grants priority to international conventions that the member states are parties to and not to conventions that they may become party to. It seems to follow that, for those maritime conventions that EU member states have joined before the

930 Article X International Convention on liability on Civil Liability for Oil Pollution Damage 1969 as amended by the 1992 Protocol (1992 CLC); Article 8 International Convention on the Establishment of an International Fund for Oil Pollution Damage as amended by the 1992 Protocol (1992 IFC); Article 8 Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (2003 Supplementary Fund Protocol); Article 10 International Convention on Civil Liability for Bunker Oil Pollution Damage 2001(Bunker); Article 40 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 (1996 HNS); Article 17 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 as amended by the 2002 Protocol (hereinafter: 2002 Athens Convention).

931 The ECJ has held in *Commission v Council* (ERTA) (Case 22/70) [1971] ECR 263 that member states have no competence to individually conclude any international agreements that may affect the common rules of the community. After the coming into force of Brussels I, Brussels I became the common rules of EU member states, therefore Brussels I and Brussels Ibis takes no account of and gives no priority to those conventions that the member states have yet joined in.

entry into force of Brussels I, namely, the 1992 CLC[932] and the 1992 IFC,[933] the recognition and enforcement of the judgments under the two conventions between two member states should follow the rules under the international maritime conventions.

However, it should be noted that, Article 71(1) does not necessarily mean that in any case the specialized rules under the international conventions will prevail. Article 71(2) further provides that, if the court of origin and the court addressed are both parties to the same international convention, as far as conditions for the recognition or enforcement of judgments are concerned, the provisions in the convention will apply. However, in any event, provisions on recognition and enforcement of judgments under the Regulation may be applied.[934]

The ECJ gives its view on how Article 71 should be applied considering the specialized provisions in the international conventions in several occasions.[935] In *Tatry*,[936] in the context of Brussels Convention 1968, the ECJ held that the purpose of the exception given by Article 57[937] Brussels Convention 1968 is to ensure compliance with the rules on jurisdiction laid down by specialized conventions, as those jurisdiction rules are based on the specific features of the matters to which they relate.[938] It was also held that, where a specialized international convention only contains specialized jurisdiction rules but no rules on provisions on recognition and enforcement of foreign judgments, Brussels Convention 1968 should be applied.[939] In *Nürnberger*,[940] the ECJ addressed the prior application of jurisdiction rules in the specialized international conventions to which two contracting states of Brussels Convention 1968 are parties as well.

Nevertheless, when it comes to the rules on recognition and enforcements, the priority between specialized conventions and Brussels Ibis is shifted. In *TNT/AXA* case,[941] the ECJ gave its view that the application of Article 71 (similar to Article 57 Brussels Convention

932 Currently, 25 EU member states are parties to the 1992 CLC, except Austria and Czechia.

933 Currently, 24 EU member states are parties to the 1992 Fund Convention, except Austria, Czechia and Romania.

934 There is a change compared with Brussels I, Article 71(2)(b) Brussels I provides that, "in any event, the provision of this Regulation which concern the procedure for recognition and enforcement of judgments may be applied."

935 Tatry (Case C-406/92) [1994] ECR I-5439; Nürnberger Allgemeine Versicherungs AG v Portbridge Transport International BV (Case C-148/03) [2004] ECR I-10327; *TNT Express Nederland BV v AXA Versicherung AG* (C-533/08) [2010] ECR I-04107.

936 *Tatry* (Case C-406/92) [1994] ECR I-5439.

937 Article 57 Brussels Convention 1968 is similar to Article 71 Brussels Ibis, but still different from Article 71. It gives priority to international conventions to which contracting states are parties and will become parties.

938 *Tatry* (Case C-406/92) [1994] ECR I-5439, para. 24. This view is echoed in *Nürnberger Allgemeine Versicherungs AG v Portbridge Transport International BV* (Case C-148/03) [2004] ECR I-10327, para. 14.

939 *Tatry* (Case C-406/92) [1994] ECR I-5439, para. 25.

940 *Nürnberger Allgemeine Versicherungs AG v Portbridge Transport International BV* (Case C-148/03) [2004] ECR I-10327.

941 *TNT Express Nederland BV v AXA Versicherung AG* (C-533/08) [2010] ECR I-04107.

1957) should be subject to the objectives of Brussels I (now superseded by Brussels Ibis). In this case, TNT intended to invoke Article 31(3) CMR[942] instead of Article 35 Brussels I to refuse enforcement of a German judgment in favour of AXA before the Dutch court, as both Germany and the Netherlands are parties to the CMR. The ECJ held that, even if specialized conventions also have rules on the recognition and enforcement of foreign judgments and to which two member states are parties, it does not necessarily mean that those rules prevail over the rules under Brussels I. Furthermore, the rules laid down in a specialized convention can only be applied where they are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimized and where they could ensure, under conditions at least as favourable as those provided for by the regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the EU.[943]

Taking the 1992 CLC as example, in Article X, it provides that,

> "Any judgment given by a Court with jurisdiction in accordance with Article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State, except:
> (a) where the judgment was obtained by fraud; or
> (b) where the defendant was not given reasonable notice and a fair opportunity to present his case.
> A judgment recognized under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened."

It is obvious that the refusal grounds under the maritime convention are wider than Brussels Ibis. Firstly, fraud is a separate ground for refusal under the maritime convention, whereas under Brussels Ibis the grounds of dealing with fraud are subsumed in the public policy exception and the interpretation of fraud should be subject to the limitations on public policy exception.[944] Secondly, the application of the grounds of the failure to give notice to refuse recognition of foreign judgments under Brussels Ibis should satisfy a precondition

942 Convention on the Contract for the International Carriage of Goods by Road 1956. Article 31(3) allows the court addressed to use the formalities under its national law to decide whether to enforce a foreign judgment. It reads, "when a judgement entered by a court or tribunal of a contracting country in any such action as is referred to in paragraph 1 of this article has become enforceable in that country, it shall also become enforceable in each of the other contracting States, as soon as the formalities required in the country concerned have been complied with. These formalities shall not permit the merits of the case to be re- opened."

943 Ibid. para. 56.

944 See Chapter 2 Section 2.7.1.

that the judgment debtor has made a challenge against the judgment in the court of origin, as long as it is possible for him to do so. However, based on the above standard provision, the judgment creditor has no obligation to challenge in the court of origin before raising an objection against the recognition and enforcement of judgments. As the rules under the maritime conventions eventually will be interpreted by courts of the contracting states and there is no ECJ-like authority to give uniform interpretation of the rules, it can be imagined that courts of contracting states may apply and interpret the rules differently.

Based on the above, it can be argued that the standard provision on recognition and enforcement of foreign judgments under the maritime conventions is less predictable as there is no uniform interpretation. Additionally, the standard provision leaves more room for the judgment debtors to challenge the judgment compared with Brussels Ibis, and therefore it is less favourable for the free movement of judgments between EU member states than Brussels Ibis. Therefore, based on the holding of the *TNT/AXA* case,[945] between EU member states, the standard provision on recognition and enforcement of foreign judgments under the two pre-Brussels I maritime conventions, i.e. the 1992 CLC and the 1992 Fund Convention, could not prevail over the rules of recognition and enforcement under Brussels Ibis.

Notably, based on *Tatry*,[946] Brussels Ibis should always be applied to deal with the issues which a specialized convention does not govern. As international maritime conventions generally have no provisions on the procedure for recognition and enforcement of judgments, it means that the procedure on recognition and enforcement of foreign judgments should always follow the approach under Brussels Ibis.

7.2.3.2 Council decisions and the post-Brussels I maritime conventions

As Article 71 only deals with the coordination between Brussels Ibis and the pre-Brussels I conventions, it has no force in face of the newly-introduced maritime conventions and amending protocols that also concern the issue of jurisdiction, recognition and enforcement of foreign judgments. For these post-Brussels I maritime conventions, on the one hand, the EU member states have no competence to become a party by themselves as these conventions affect the common rules;[947] on the other hand, there is a necessity for EU

945 *TNT Express Nederland BV v AXA Versicherung AG* (C-533/08) [2010] ECR I-04107.

946 *Tatry* (Case C-406/92) [1994] ECR I-5439, para. 25.

947 For example, in Recital 7 Common Position No 19/2008 adopted by the Council on 6 June 2008 with a view to adopting Regulation (EC) No … /2008 of the European Parliament and of the Council of … on the liability of carriers of passengers by sea in the event of accidents (2008/C 190 E/02), it is provide that, "The matters covered by Articles 17 and 17bis of the Athens Convention fall within the exclusive competence of the European Community insofar as those Articles affect the rules established by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters … ".

member states to join in the newly-introduced maritime conventions and their protocols, in order to keep up the pace of the development of the international shipping community.

a Council decisions give priority to Brussels Ibis

At this point, the European Council made three corresponding decisions to grant the authority for the member states to individually become a party to the maritime conventions and the amending protocol,[948] i.e. the 1996 HNS,[949] the 2001 Bunker Convention[950] and the 2003 Supplementary Fund Protocol.[951]

For example, in the Council decision for the Bunker Convention,[952] it provides that,

> "… (2) Articles 9 and 10 of the Bunkers Convention affect Community secondary legislation on jurisdiction and the recognition and enforcement of judgments, as laid down in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
> (3) The Community therefore has sole competence in relation to Articles 9 and 10 of the Bunkers Convention inasmuch as those Articles affect the rules laid down in Regulation (EC) No 44/2001. The Member States retain their competence for matters covered by that Convention which do not affect Community law…"[953]

948 Council Decision of 18 November 2002 authorizing the Member States, in the interest of the Community, to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (2002/971/EC), O.J. 2002 L 337/55; Council Decision of 19 September 2002 authorizing the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage (2002/762/EC), O.J. 2002 L 256/7; Council Decision of 2 March 2004 authorizing the Member States to sign, ratify or accede to, in the interest of the European Community, the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, and authorizing Austria and Luxembourg, in the interest of the European Community, to accede to the underlying instruments (2004/246/EC), O.J. 2004 L 78/22.

949 Currently, only Cyprus, Germany and Lithuania have ratified the 1996 HNS and this convention has yet come into force.

950 Currently, all EU member states have ratified the 2001 Bunker Convention.

951 Currently, except Austria, Bulgaria, Cyprus, Czechia, Luxembourg, Malta, Romania, other EU member states have ratified this protocol.

952 Council Decision of 19 September 2002 authorizing the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage (the Bunkers Convention) (2002/762/EC), O.J. 2002 L 256/7.

953 Ibid.

It can be observed that, in line with the views of the ECJ,[954] the Council decisions grant priority to the jurisdiction rules under the international maritime conventions. However, unlike the equivocal wording of Article 71, it explicitly provides that the provisions on the recognition and enforcement of foreign judgments under these international maritime judgments have no superior effect than the rules under Brussels I (also Brussels Ibis).

b Special provision in the 2002 Athens Convention

In the deliberation of the 2002 amending protocol of the Athens Convention 1974,[955] the EU representatives raised the issue of exclusive competence on the matters of recognition and enforcement of foreign judgments.[956] This results in a specialized article allowing the EU as a contracting state to accede to the convention,[957] which helps to coordinate with the EU's exclusive competence. When the EU is able to join in a convention as a contracting state, there is no need to grant competence to the member states to individually become a party to the convention. Furthermore, in order to enhance the superiority of Brussels I (now Brussels Ibis) between EU member states, Article 17bis 2002 Athens Convention provides that, the recognition and enforcement between EU member states should apply the more favourable rules. And it has been addressed by the European Commission that between EU member states Brussels I has the "more favourable rules" in the light of Article 17bis.[958]

From the above, for those post-Brussels Ibis maritime conventions, the EU has adopted two different approaches to dealing with the limitations of its external competence and making it possible for EU member states to become a party to it. The general idea of the two approaches is the same and consistent with Article 71 Brussels Ibis and the ECJ's

954 *Tatry* (Case C-406/92) [1994] ECR I-5439, para. 24. This view is echoed in *Nürnberger Allgemeine Versicherungs AG v Portbridge Transport International BV* (Case C-148/03) [2004] ECR I-10327, para. 14.

955 The 2002 Athens Convention was formally adopted by the EU by the Council Decision of 12 December 2011 concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (2012/23/EU), O.J. 2012 L 8/13.

956 'Consideration of a Draft Protocol of 2002 to Amend the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974', submitted by the European Commission, LEG/CONF.13/7 (18 July 2002) and Annex 1 Questions and Answers Relating to the New Provisions, Question 10.

957 Article 19 (1) provides that, "a Regional Economic Integration Organization, which is constituted by sovereign States that have transferred competence over certain matters governed by this Protocol to that Organization, may sign, ratify, accept, approve or accede to this Protocol. A Regional Economic Integration Organization which is a Party to this Protocol shall have the rights and obligations of a State Party, to the extent that the Regional Economic Integration Organization has competence over matters governed by this Protocol."

958 'Consideration of a Draft Protocol of 2002 to Amend the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974', submitted by the European Commission, LEG/CONF.13/7 (18 July 2002) Annex 1 Questions and Answers Relating to the New Provisions, Question 10; Annex 2 More Detailed Information on EU Regulation 44/2001 and its Provisions on Recognition and Enforcement.

rulings,[959] that is, the jurisdiction rules under the maritime conventions prevail over Brussels Ibis except for the rules on recognition and enforcement of foreign judgments. And this further follows that the procedure for recognition and enforcement of foreign judgments should also be based on the approach under Brussels Ibis.

7.2.4 Preliminary summary

Under Brussels Ibis, the procedure for the recognition of foreign judgment is simple and straightforward, no matter whether the judgment needs enforcement nor not. A judgment creditor can directly raise a foreign judgment from a member state before a court of another member state for recognition or before a competent enforcement authority of another member state for enforcement, with the required copy of judgment and certificate.

Even though there are international maritime conventions that also regulate the issue of recognition of foreign judgments, the simple procedure of the Brussels Ibis is still preferred. Between two EU member states who are both parties to the same international maritime convention, the recognition and enforcement of a judgment that derives from that convention should always be in line with the requirements and procedure as prescribed under Brussels Ibis.

7.3 English law

7.3.1 General procedures for the recognition of foreign judgments

A judgment creditor can apply for a summary judgment if the defendant has no real prospect of successfully defending the claim.[960] Irrespective of whether a foreign judgment it seeks recognition for with or without enforcement purpose, the judgment creditor can institute an action at common law to this end.[961]

It is generally recognized that English courts possess the jurisdiction for actions for enforcement of foreign judgments. It was held in *Owens Bank Ltd v Bracco*,[962]

959 *Tatry* (Case C-406/92) [1994] ECR I-5439; *Nürnberger Allgemeine Versicherungs AG v Portbridge Transport International BV* (Case C-148/03) [2004] ECR I-10327; *TNT Express Nederland BV v AXA Versicherung AG* (C-533/08) [2010] ECR I-04107.

960 Civil Procedure Rules ((hereafter: CPR)) Part 24, on Summary Judgments, Rule 24.2. This also means that foreign judgments satisfy all the requirement for recognition under common law.

961 Dicey, Morris and Collins (2016) p.664-668.

962 [1992] 2 AC 443 (HL).

> "In relation to enforcement, there is no question of forum conveniens, nor is there any ground for compelling a judgment creditor to elect as to his forum. He is perfectly entitled to seek enforcement until his judgment debt is satisfied. The English court must control enforcement in England…."[963]

However, it has been argued by the judgment debtor in *Tasarruf Mevduati Sigorta Fonu v Demirel*[964] that, for the jurisdiction for enforcement action to exist "there must be at least a real prospect of assets within the jurisdiction against which the judgment could be enforced".[965] In this connection, with the adoption of the Practice Direction 6B paragraph 3.1 (10),[966] there are no questions any more. It is provided that a foreign judgment or award in itself is sufficient ground to grant leave for enforcement.[967]

Where recognition of a foreign judgment is sought with enforcement purpose and where it falls within the scope of the 1920 Act or 1933 Act,[968] the judgments creditor is entitled to employ the direct registration mechanism for enforcement of foreign judgments, by making an application to the High Court.[969] In this process, the judgment creditor should provide evidence concerning the foreign judgment.[970] Where the registration is granted to the judgment creditor, the judgment debtor is entitled to seek the setting aside of the application within the period set out in the registration order. In the case of disputed issues between the parties, the court where the application for registration was made is competent to hold a trial.[971]

Notably, the direct registration mechanism is only for foreign judgments under which a sum of money is payable.[972] As for the exclusive nature of the procedure of registration, it is provided by Section 6 1993 Act that, if a foreign judgment falls within the scope of the

963 Ibid.
964 [2007] 2 Lloyd's Rep 440 (CA).
965 Ibid.
966 Practice Direction 6B (supplements CPR Part 6 on Service of Documents Section IV) Rule 3.1, "the claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where … (10) A claim is made to enforce any judgment or arbitral award." This head was introduced by SI 1983/1181, with effect from 1st January 1987 as part of substantial reforms after the coming into force of the Civil Jurisdiction and Judgments Act 1982.
967 Enforcement (para. 3.1(10)), UK White Book 2017 Volume 1.
968 CPR 74.3 provides, "(1) This Section provides rules about applications under – (a) section 9 of the 1920 Act, in respect of judgments to which Part II of that Act applies; (b) section 2 of the 1933 Act, in respect of judgments to which Part I of that Act applies; (c) sections 4 and 4B (2005 Hague Convention) of the 1982 Act; and (d) the Lugano Convention, for the registration of foreign judgments for enforcement in England and Wales … "
969 CPR 74.3 (2) provides, "applications – (a) must be made to the High Court; and (b) may be made without notice."
970 CPR 74.4.
971 CPR 74.7.
972 Section 121(1) 1920 Act and Section 1(2)(b) 1933 Act.

1933 Act, it can be only enforced through registration. In contrast, the 1920 Act still leaves room for the judgment creditors to choose between raising an action and seeking registration.[973]

7.3.2 Admiralty procedure for the recognition of foreign maritime judgments

7.3.2.1 Recognition and enforcement of foreign maritime judgments in the admiralty jurisdiction

Pursuant to the Senior Courts Act 1981 (hereafter SCA 1981),[974] there is an independent Admiralty jurisdiction of the High Court. Section 20 lists all the situations under Admiralty jurisdiction. *Prima facie*, there is no indication that the Admiralty court has jurisdiction to enforce foreign judgments. However, it follows from Section 20 (1) (c) SCA[975] that the Admiralty jurisdiction of the High Court has inherited all jurisdiction established during its development, including jurisdiction established in earlier legislation and case law.

In *The City of Mecca*,[976] Sir Robert Phillimore referred to several old cases to demonstrate that Admiralty jurisdiction for enforcement of foreign maritime judgments was recognized in the past:

> "It is a ruled case that one judge must not refuse upon letters of request, to execute the sentence of another foreign judge when the persons or goods sentenced against are within his jurisdiction…"[977]

Besides, he emphasized that enforcing foreign judgments of foreign courts is the last branch of admiralty jurisdiction and a court of admiralty in one country can put into effect the determination of a court of admiralty in another.[978] Based on all these considerations, Sir Robert Phillimore held that,

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973 Section 9 (5) 1920 Act.

974 This Act was originally known as the "Supreme Court Act 1981"". The name was changed in 2005 to avoid confusion because of the renaming of the house of Lords to "Supreme Court of England and Wales" with effect as from 2009.

975 Section 20(1) of the SCA, 1981 provides, "the Admiralty jurisdiction of the High Court shall be as follows … (c) any other Admiralty jurisdiction which it had immediately before the commencement of Act".

976 (1879) 5 PD 28.

977 Ibid. He also noted a different old case, which concerns the enforcement of a sentence given by the Spanish Admiralty Court. The court agreed that, "where sentence is obtained in a foreign admiralty, one may libel for execution thereof here, because all the courts of admiralty in Europe are governed by the civil law, and are to be assistant one to another, though the matter was not originally determinable in our Court of Admiralty".

978 (1879) 5 PD 28.

> "It is the duty of one admiralty court, a duty arising from the international comity, to enforce the decree of another upon a subject over which the latter had jurisdiction. I do not think it necessary to enter into a consideration of all the cases decided by the Common Law Courts to the effect of foreign judgments in this country. The general principle of recognizing and giving effect to such judgments is now admitted by these Courts… in fact, what the Common Law Courts do indirectly by implying the contract, the Admiralty Court does directly, without any such implication, on the grounds of international comity."[979]

More recently, in *The Despina G.K.*,[980] Mr. Justice Sheen held that the Admiralty Court has jurisdiction for the recognition and enforcement of foreign maritime judgments.[981]

7.3.2.2 Recognition and enforcement of foreign maritime judgments by action *in rem*

One of the peculiarities of the English admiralty jurisdiction is the procedure of an action *in rem* against the ship (i.e. the procedure to get the ship arrested).[982] An action *in rem* is usually instituted by claimants who have qualified maritime claims. As the institution of an action *in rem* may be followed with an arrest of ship,[983] and this will paralyse the operation of the ship and even result in a huge economic loss for the shipowner. The shipowners are very likely to provide security to free the ship without a delay. In some sense, the security provided by the shipowner is a good guarantee for the satisfaction of the claim. Given this advantage, it is a desirable way for a judgments creditor to enforce a foreign judgment by instituting an action *in rem*.

a Foreign maritime judgments in rem

The leading case is *The City of Mecca*.[984] This case concerned a collision dispute. In the prior Portuguese proceedings, the plaintiff obtained a favourable judgment against the shipowner of the *The City of Mecca*. However, the plaintiff obtained no security from the

979 Ibid.
980 [1982] 2 Lloyd's Rep 555 (QB).
981 In this case, he also held that Section 20(1) SCA 1981, "refers to Section 1 of the Administration of Justice Act, 1956", which provides, "the Admiralty jurisdiction of the High Court shall be as follows, that is to say jurisdiction to hear and determine any of the following questions or claims … together with any other jurisdiction which either was vested in the High Court of Admiralty immediately before the date of the commencement of the Supreme Court of Judicature Act 1873 or is conferred by or under an Act which came into operation on or after that date on the High Court as being a Court with Admiralty jurisdiction … "
982 Section 21 SCA 1981.
983 61.5 (1)(a)(b) CPR.
984 (1879) 5 PD 28.

shipowner nor was the ship arrested. Therefore, the plaintiff instituted an action *in rem* against the said ship for the enforcement of the Portuguese judgment before the English admiralty court.

Based on the precedents that confirmed the admiralty court's jurisdiction to recognize and enforce foreign judgments, the court held that if the admiralty court allowed a party to enforce a maritime claim by an action *in rem*, it should also allow a party to enforce a foreign judgment which judicially confirmed a maritime claim. Besides, as the judgment creditor had not obtained security in the previous proceedings, it was reasonable that the admiralty court allowed the judgment creditor to arrest the ship to prevent the wrongdoers from evading their liability.[985] However, in the court of appeal, the decision was reversed. It was held that, as the Portuguese judgment was not a "judgment *in rem*" but a "judgment *in personam*",[986] it could not be enforced by action *in rem*.

Almost a century later, in *The Despina G.K.*,[987] after the Swedish admiralty court had rendered a judgment on cargo damage, the judgment creditor sought enforcement of the unsatisfied Swedish judgment in England by instituting an action *in rem*.[988] After confirming that, based on the affidavit, the Swedish judgment was a judgment *in rem*, the court held that the judgment could be enforced by action *in rem*. Further it was held that the underlying rationale does not lie in the judgment creditor being in the same position as a maritime lienee to initiate an action *in rem*.[989] Rather it was held that a judgment creditor who had obtained a final judgment *in rem* in a foreign admiralty court could bring an action *in rem* against that ship in the Admiralty court if this was necessary to complete the execution of that judgment.[990]

b Foreign maritime judgment in personam?

The above cases explicitly exclude foreign judgments *in personam* from being enforced by an action *in rem*, however CPR Part 61.5(1) provided that,

985 Ibid.

986 (1881) 6 PD 106, 117. It was argued that a "judgment *in rem*" should be derived from a proceeding in which the ship was claimed against by the plaintiff. However, the prior proceeding in Lisbon was only between the parties, not the ship. Therefore, the foreign judgment could only be deemed as a judgment *in personam* and the Court had no jurisdiction to enforce a judgment in a personal action by proceedings *in rem* (arrest ship).

987 [1982] 2 Lloyd's Rep 555 (QB).

988 In the Swedish proceeding *in rem*, the shipowner has put up security for the release of the ship. As for the result, the Stockholm District Court Division ordered the shipping company to pay the plaintiff "2,410,188 Dutch guilders or the equivalent sum in Swedish currency". The District Court awarded a maritime lien on the vessel *Despina G.K.* for the plaintiff's claim. In the appeal, the Appeal Court declared that the payment including the interests and the legal costs would not be "levied on any property of the shipping company other than the vessel *Despina G.K.*". A few months later, the Swedish Court upheld the decision of the Appeal Court.

989 [1982] 2 Lloyd's Rep 555 (QB).

990 Ibid.

> "in a claim in rem–(a) a claimant; and (b) a judgment creditor may apply to have the property proceeded against arrested."[991]

Literally, this provision allows a judgment creditor to issue a claim *in rem* in any event. However, in its previous version, i.e. the Procedural Direction 49 F of the CPR 1998, it provides that,

> "except as provided in this Practice Direction, the Claimant in a claim in rem and a judgment creditor in a claim in rem is entitled to have the property proceeded against arrested."

It can be found that the qualifier for "a judgment creditor" was removed in the latest version. Given this, it has been suggested that the change of wording means that a judgment creditor could start an action *in rem* under admiralty jurisdiction to enforce a foreign maritime judgment, irrespective of whether the judgment is against the ship or the liable party.[992]

c The essence of action in rem

Before concluding whether all types of foreign maritime judgments can be recognized and enforced by action *in rem*, it is necessary to review the holdings of the two leading cases.

Notably, although the two cases reach the same conclusion, they are not based on the same logic. In *The City of Mecca*,[993] the focus of the court was whether a foreign judgment *in personam* could be enforced against the ship. The court conducted an analysis by analogy based on the practice of enforcement of maritime claims. The underlying idea was that if the foreign judgment was against the ship, i.e. judgment *in rem*, then the ship could be arrested again in the English court for the enforcement of the judgment.

However, in *The Despina G.K.*, the court made a distinction between an action *in rem* for enforcement of foreign judgments and for enforcement of maritime claims.[994] As for the former, the enforcement can only proceed against assets of the judgment debtor. However, as for the latter, although it is also against the ship, the ship may not be an asset of the judgment debtor when the proceedings begin.[995] In other words, in a case of

991 CPR Part 61.5 Arrest.

992 Tsimplis and Gaskell (2002) p.526.

993 (1881) 6 PD 106.

994 *The Despina G.K.* [1982] 2 Lloyd's Rep 555 (QB). It was held, "there is the further distinction between an action *in rem* which may be brought in the High Court against the ship, and execution of a judgment obtained in such an action."

995 *The Despina G.K.* [1982] 2 Lloyd's Rep 555. It was held, "a judgment creditor who has obtained a final judgment against a shipowner by proceeding *in rem* in a foreign Admiralty Court can bring an action *in rem* in this Court against that ship to enforce the decree of the foreign Court if that is necessary to complete

recognition and enforcement of foreign judgments, an action *in rem* is essentially an enforcement action against the ship of the judgment debtor. In practice, while some courts may mix up these two kinds of action *in rem*,[996] there are courts who are not confused by their same appearance.[997]

If an action *in rem* for the recognition and enforcement of a foreign judgment is considered an enforcement action against the judgment debtor and an arrest warrant against assets of the judgment debtor, it would be unnecessary to exclude foreign judgments *in personam* from being enforced by an action *in rem*. Moreover, in combination with the provision in CPR Part 61.5(1), it is sensible to argue that an action *in rem* against the judgment debtor's ship can be used to enforce foreign maritime judgments in the admiralty jurisdiction of the High Court, regardless of the types of the judgments.

7.3.2.3 Recognition and Enforcement of foreign judgments under international maritime conventions

a Enforcement jurisdiction

According to Section 20 (5) SCA 1981, the jurisdiction of the admiralty court extends to cases concerning the civil liability for oil pollution damage, as provided under Chapter III of Part VI of the Merchant Shipping Act 1995, and to cases regarding the "International

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the execution of that judgment, provided that the ship is the property of the judgment debtor at the time when she is arrested."

996 *The Point Breeze* (1928) 30 Lloyd's Rep 229; [1928] P 135, Mr. Justice Bateson treated the practice in *The Freedom* (1869-72) LR 3 A&E 495, 499, as the ordinary action *in rem*. In *The Freedom*, the cargo was damaged and delivered in bad order and condition, the endorsees of the bills of lading instituted an *in rem* action against the American ship and thereafter the shipowner defended the case in the court. The cargo interests roughly claimed the damage amount was around 200£ to 300£, therefore, they arrested the ship with the claim amount of 500£, thereafter, the shipowner put up a bail of 500£ to get the ship released. Following with the preliminary action, the cause was decided by the admiralty court between the cargo interests and the shipowner, where it was determined that the actual damage and costs in total was around 8842. In the light of this, the plaintiff applied to obtain "execution and satisfaction of the said judgment for damages and costs" by arresting the ship.

997 *The Alletta* [1974] 1 Lloyd's Rep 40 (QB), Justice Mocatta reasoned that the ship arrest in *The Freedom* merely concerned a writ of *fieri facias*. Similarly, in *The Gemma* [1899] P 285 (CA), after a collision, the plaintiff instituted an action *in rem* against the defendant's ship and got security in respect of the full amount of the value of the vessel and her freight. The defendant appeared and after the proceeding, the defendant's ship was found alone to blame and the judgment has rendered against the defendant and the provided security. Having realizing that the security was not sufficient to pay for the full damage, the plaintiff applied to arrest the defendant's ship again. It was held by that court the plaintiff was entitled to get a writ of *fieri facias* against the goods and chattels of the defendant i.e. ship of the defendant. This case was mentioned in *The Despina G.K.* as an example of enforcement action against the ship. The court finally held that, "a judgment creditor who has obtained a final judgment against a shipowner by proceeding *in rem* in a foreign Admiralty Court can bring an action *in rem* in this Court against that ship to enforce the decree of the foreign Court if that is necessary to complete the execution of that judgment, provided that the ship is the property of the judgment debtor at the time when she is arrested."

Oil Pollution Compensation Fund, or on the International Oil Compensation Fund 1984, under Chapter IV of Part VI of the Merchant Shipping Act 1995, or on the International Oil Pollution Compensation Supplementary Fund 2003".

Section 166 (4) and Section 177(4) belong respectively to Chapter III, Chapter IV of Part VI and of the Merchant Shipping Act 1995, which concern the recognition and enforcement of foreign judgments under the international maritime conventions. This means that the admiralty court has jurisdiction for the recognition and enforcement of foreign judgments under the said conventions.

b Reference to the 1933 Act

English law has incorporated most of the ship pollution conventions into its domestic laws, namely the 1992 CLC, the 2001 Bunker Convention, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol. Legislators opted for the mechanism of the 1933 Act to fulfil the obligation of recognition and enforcement of foreign judgments under these conventions.

Specifically, the Merchant Shipping Act 1995[998] provides that, Part I of the 1933 Act is applicable for the recognition and enforcement of foreign judgments under the 1992 CLC. Similar provisions are included in the Merchant Shipping (Oil Pollution) (Bunker Convention) Regulations 2006,[999] which now serves both the 1992 CLC and the 2001 Bunker Convention, and the Merchant Shipping Act,[1000] which serves the 1992 Fund Convention and the 2003 Supplementary Fund Protocol.

When the High Court of the Admiralty receives a registration application, according to N10.2 of the Admiralty and Commercial Courts Guide, it will usually be referred to the Admiralty Registrar. The Admiralty Registrar then holds hearings on the application and examines the evidence. If the requirements for recognition can be met, an order for the registration will be rendered.

c Jurisdiction rules under international conventions

Even though it requires a reference to the 1933 Act, it can be found that the jurisdiction of the foreign court should only be decided in accordance with the rules under the international conventions.

Taking the 1992 CLC as an example, it is provided that the jurisdiction of the foreign court should only be determined by the rules under the convention rather than English law.[1001] Based on the 1992 CLC, where the state party in whose territory the oil pollution

998 Section 166 (4) Merchant Shipping Act 1995.
999 Section 20(4) of The Merchant Shipping (Oil Pollution) (Bunker Convention) Regulations 2006.
1000 Section 177 (4) Merchant Shipping Act.
1001 Section 166 (4) Merchant Shipping Act 1995.

damage occurred or where measures were taken to prevent or minimize pollution damage, the proceedings in respect of the damage can only be brought in that state party, and the judgment should be recognized and enforced by other state parties. However, such jurisdiction rule apparently does not satisfy Section 4(2) of the1933 Act.

7.3.3 Preliminary summary

Under English law in general, the recognition of foreign judgments can be sought through raising an action or mere registration. As for the former, English law has no limits on the jurisdiction of the court where an action for recognition and enforcement of a foreign judgment is sought. Where a foreign judgment falls within the scope of the two statutes, the recognition and enforcement of the judgment is proceeded by registration. The registration procedure is exclusive for the recognition and enforcement of judgments under the 1933 Act.

With regard to foreign maritime judgments, the procedure of registration under the 1933 Act should also be applied if the judgment is derived from an international maritime convention to which the UK is a contracting state. The case law also shows that it is possible to use the specialized admiralty procedure, i.e. action *in rem*, to enforce a foreign maritime judgment. However, before the English admiralty court gives its permission to an action *in rem* against the ship, the court will consider whether the foreign judgment is of *in rem* nature or whether the foreign judgment is enforced against the ship of the judgment debtor.

7.4 The US law

7.4.1 General procedures for the recognition of foreign judgments

7.4.1.1 The approaches under the statute and common law

Where a foreign judgment is merely sought recognition without enforcement before a federal court, it is possible for the judgment creditor to seek a declaratory judgment for the recognition of the judgment.[1002] This is also possible if the recognition of foreign judgments is sought before some state courts with enforcement purposes, such as New York state and California.[1003] Where a declaratory judgment is sought, a court has the discretion to decide whether such declaratory judgment should be granted.

1002 28 U S C § 2201.
1003 Civil Practice Law and Rules § 3001 (N.Y.); Code of Civil Procedure § 1060 (Cal.)

However, in most cases, a foreign judgment is sought recognition for an enforcement purpose. If this happens before a federal court, based on Rule 69 of the Federal Rules of Civil Procedure, it provides that the procedure for recognition and enforcement of judgments should be in accordance with the procedure of the state where the court is located.[1004]

Besides providing for the requirements and refusal grounds for recognition of foreign country judgments, the two Acts have given some guidance on the state procedure for recognition of foreign judgments. The 1962 Act provides that, if a foreign judgment is sought for recognition and enforcement, the procedure can be the same as recognition and enforcement of sister-state judgments, namely by registration.[1005] However, this approach is rejected in the 2005 Act, which provides that the recognition of foreign country judgments shall be raised by filing separate proceedings.[1006] When a foreign judgment is recognized, the party can enforce the judgment as a judgment rendered in this state.[1007] It is viewed that the registration procedure mainly serves as a benefit offered to sister-state judgments based on the presumption of fairness and competence of sister-state courts.[1008] American courts have "lesser expectations" of foreign country judgments.[1009] Therefore, a separate action is preferable in that this allows courts to assess whether the judgment from foreign proceedings frustrates the fundamental fairness and justice required in the American judicial system.

It should be noted that the procedure for recognition of foreign judgments as prescribed in the two Acts is by no means exclusive. Even a state which has adopted the 1962 Act or the 2005 Act may not follow the procedure as prescribed by the Acts.[1010] Furthermore, where a state does not follow either of the two Acts, the recognition of foreign judgments will proceed based on the common law rules. In this connection, it is also necessary for

1004 Rule 69 Federal Civil Procedure provides, "(1) Money Judgment; Applicable Procedure. A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies … "

1005 Section 3 1962 Act provides, "a foreign judgment meeting the requirements of Section 2 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit." The Uniform Enforcement of Foreign Judgments Act 1964 has provided a simplified way of enforcing judgments entered in another state, implementing full faith and credit. See also in Strong (2014) p.76-77.

1006 Section 6 2005 Act provides, "(a) if recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign country judgment. (b) If recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim, or affirmative defence."

1007 Section 7 (2) 2005 Act.

1008 Comment of Section 6 2005 Act.

1009 Ibid.

1010 Strong (2014) p.76-78.

the judgment creditor to raise a separate action for the recognition of foreign judgments.[1011] If the recognition of foreign judgments is for enforcement purposes, the normal procedures for a suit based on a debt should apply.[1012] If the recognition of foreign judgments is only sought for preserving the rights without enforcement, American courts will make a declaratory judgment upon the judgment creditor's application.[1013]

7.4.1.2 Jurisdiction requirements for recognition actions with enforcement purposes

As the 2005 Act does not provide for any details on actions for the recognition of foreign judgments, the requirements should refer to common law rules. If the purpose of recognition of foreign judgments is for seeking enforcement, there are some requirements for the jurisdiction of the court in which the action is brought. There are generally three views:

a No requirements for personal jurisdiction and the presence of assets

In *Lenchyshyn v Pelko Electric, Inc*,[1014] the court held that personal jurisdiction over the judgment debtor is not required for the enforcement action as neither the Due Process Clause nor New York law contain this requirement.[1015] It follows that the jurisdiction of the court can be established regardless of whether the defendant has contacts with the court or assets within the jurisdiction. Even though the defendant has no assets within the jurisdiction, the plaintiff can still receive a judgment on the recognition and enforcement of the foreign judgment in his favour.[1016] In line with this view, a Texas court held that neither personal jurisdiction over judgment debtors nor presence of their assets should affect the proceeding in which judgment creditors pursue recognition and enforcement of foreign judgments. This is because the Recognition Act does not require personal jurisdiction over the judgment debtor for recognition, nor does it provide that lack of property within the jurisdiction leads to non-recognition.[1017]

b Personal jurisdiction as the bottom line

By contrast, *Base Metal Trading, Ltd. v OJSC "Novokuznetsky Aluminim Factory"*,[1018] concerned the enforcement of a foreign arbitral award. The US Court of Appeals, 4th

1011 § 482 Restatement (Fourth) of the Foreign Relations Law (2018).
1012 § 482 Comment a, Restatement (Fourth) of the Foreign Relations Law (2018).
1013 Ibid.
1014 *Lenchyshn v Pelko Elec, Inc* 281 A D 2d 42 (2001).
1015 Ibid. 43.
1016 Ibid.
1017 *Haaksman v Diamond Offshore (Bermuda), Ltd* 260 S W 3d 476 (Tax App 2008); *Beluga Chartering BV v Timber SA* 294 S W 3d 300 (Tax App 2009).
1018 283 F 3d 208 (4th Cir 2002).

Circuit, held that personal jurisdiction over the defendant could not be replaced by the presence of the defendant's assets. The reason was that the exposed assets within the jurisdiction did not constitute sufficient contact between defendant and court.[1019]

It has also been viewed that the requirement of personal jurisdiction over the defendant is implied in Section 6 2005 Act. According to paragraph (b), if recognition is raised as a defence in a pending action this will not give rise to problems of lack of personal jurisdiction. This is because the party against whom recognition is raised (usually the plaintiff) has already consented to the court's jurisdiction by bringing the action. Therefore, where the issue of recognition is raised "by filing an action seeking the recognition of the foreign-country judgment", the jurisdiction of the court should be based on the personal jurisdiction over the judgment debtor.[1020]

c Either personal jurisdiction or the presence of assets

In *Shaffer v Heitner*,[1021] the US Supreme Court held that:

> "once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter."[1022]

In this case, the Supreme Court distinguished between enforcement actions and actions on the original cause of action. Therefore, jurisdiction to decide the original cause of action is not necessary for a court to have jurisdiction for the enforcement action.[1023] This view is endorsed by the Restatement (Fourth) Foreign Relations Law,[1024] and it is stated that,

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1019 The court held that "when claims to property that is found in forum state are the source of the underlying controversy between the plaintiff and a non-resident defendant, it would be unusual for the state where the property is located not to have personal jurisdiction over the defendant; however, when the property which serves as the basis for jurisdiction is completely unrelated to the plaintiff's cause of action, the presence of property alone will not support jurisdiction."

1020 Brand (2010) p.12.

1021 433 US 186 (1977).

1022 433 US 186 (1977), footnote 36.

1023 In § 482 Comment b, Restatement (Fourth) Foreign Relations Law (2018), "to recognize a foreign judgment, a court must also have personal jurisdiction. Normally jurisdiction will exist only if the persons whom the decision recognizing the foreign judgment will bind have sufficient contacts with the forum to satisfy due process as well as the forum's rules for personal jurisdiction. In the case of a proceeding to enforce a foreign judgment, however, the presence of assets belonging to any person against whom enforcement is sought will satisfy due process."

1024 § 482 Comment b, Restatement (Fourth) Foreign Relations Law (2018).

> "to recognize a foreign judgment, a court must also have personal jurisdiction. Normally jurisdiction will exist only if the persons whom the decision recognizing the foreign judgment will bind have sufficient contacts with the forum to satisfy due process as well as the forum's rules for personal jurisdiction. In the case of a proceeding to enforce a foreign judgment, however, the presence of assets belonging to any person against whom enforcement is sought will satisfy due process."[1025]

Following this view, in *Electrolines v Prudential Assurance Co*,[1026] it was held that jurisdiction for the enforcement action can be established either through personal jurisdiction over the defendant or the presence of property within the jurisdiction.[1027] Furthermore, this view was also adopted by the ALI's Proposed Federal Statute.[1028] Section 9 provides: (b) an action to recognize or enforce a judgment under this Act may be brought in the appropriate state or federal court (i) where the judgment debtor is subject to personal jurisdiction; or (ii) where assets belonging to the judgment debtor are situated.[1029]

7.4.2 Admiralty procedure for the recognition of foreign maritime judgments

Article III, §2 U.S. Constitution empowers the federal court to hear "all cases of admiralty and maritime jurisdiction". In implementing the Constitution, Section 9 1789 Judiciary Act provides that the federal court is granted exclusive jurisdiction over maritime cases,[1030] as superseded by §1333 Title 28 Judiciary and Judicial Procedure. It reads as follows:

1025 Ibid.

1026 *Electrolines v Prudential Assurance Co* 677 N W 2d 874, 885 (Mich App 2003).

1027 Ibid.

1028 American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006).

1029 Ibid. §9.

1030 Section 9 1789 Judiciary Act provides, "that the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States. . . . And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the district courts, in all cases except civil causes of admiralty and maritime jurisdiction, shall be by jury". See also in Charles L Black, 'Admiralty Jurisdiction: Critique and Suggestions' (1950) 50 *Colum L Rev* 3 259, 262.

> "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) any civil case of admiralty or maritime jurisdiction, saving to the libellant or petitioner in every case any other remedy to which he is otherwise entitled …"[1031]

As federal courts generally hold the jurisdiction on maritime cases, if a judgment creditor intends to seek recognition of a foreign judgment without enforcement purpose, it is possible for him to seek a declaratory judgment before the federal court.[1032] Where a judgment creditor intends to seek recognition of a foreign maritime judgment with enforcement purpose, the federal admiralty court offers a specialized procedure for this.

7.4.2.1 Federal admiralty jurisdiction for recognition and enforcement of foreign judgments

a The Penhallow rule

Shortly after the adoption of the 1789 Judiciary Act, the federal courts were granted specific jurisdiction for the enforcement of foreign maritime judgments. In *Penhallow v Doane's Administrators*,[1033] the US Supreme Court held that the admiralty court in one nation can give effect to the determination of the admiralty court of another".[1034] This holding was repeatedly followed in subsequent cases.

In *The Jerusalem*,[1035] Story J held that foreign maritime judgments between foreigners can be enforced where either property or the judgment debtor is within its jurisdiction. In *The Centurion*,[1036] the court held that an admiralty court has jurisdiction to enforce any judgment of another admiralty court. In *Otis v The Rio Grande*,[1037] it was held that it was the duty of the federal admiralty court to carry into effect the adjudications from other federal courts as well as from foreign admiralty courts.[1038] In *Hilton v Guyot*,[1039] the US Supreme Court not only established the general standard for recognition of foreign judgments, but also expressly held that the decree of an admiralty court abroad was equally conclusive with decrees of admiralty courts in the United States. *International Seafood, Ltd. V M/V Campeche*,[1040] concerned the recognition and enforcement of a monetary

1031 28 U S C A §1333 (1948).
1032 Reporters' Notes 2 § 482 Restatement (Fourth) Foreign Relations Law (2018).
1033 3 US 54 (1795).
1034 3 US 54 (1795).
1035 13 F Cas 559 (1814).
1036 5 F Cas 369, 370 (1839).
1037 18 F Cas 902, 903 (1872).
1038 Ibid.
1039 159 US 113 (1895).
1040 566 F 2d 482 (5th Cir 1978).

judgment rendered by the admiralty courts of Barbados in a collision case. The US Court of Appeals, Fifth Circuit held that admiralty courts have jurisdiction to enforce foreign maritime decrees that award money damages.[1041] Furthermore, they also have jurisdiction to enforce a foreign judgment of another admiralty court regardless of its lack of maritime flavour.[1042]

b Extension of the enforcement jurisdiction

According to *Penhollow v Doane's Administrators*,[1043] foreign judgments originating from foreign admiralty courts can be enforced in the federal admiralty jurisdiction. However, as the shipping industry developed and new types of maritime disputes emerged, the insufficiency of the *Penhallow* rule became apparent. As it has been suggested that,[1044]

> "it is thus, at times, necessary to determine whether a foreign court possesses admiralty jurisdiction, but it is not necessary to inquire into whether the foreign court was an 'admiralty court' in the sense of a specialized court of limited jurisdiction. Rather, any court possessing the jurisdiction to resolve maritime cases under the laws of the country in which it sits should be considered to have the authority to render judgments which will be given the effect of 'admiralty' judgments in the United States. For example, a court with jurisdiction to adjudicate in rem claims should be considered an 'admiralty court'"[1045]

In *Vitol*,[1046] the defendant tried to oppose federal admiralty jurisdiction for the enforcement of an English judgment concerning oil spill damage given by the Commercial Court. Referring to the case *Victrix S.S. Co., S.A. v Salen Dry Cargo A.B.*,[1047] in which the court held that an admiralty court has the jurisdiction to enforce a foreign judgment based on a maritime claim, the US Court of Appeals, Fourth Circuit then held that the dispositive question to establish federal admiralty jurisdiction for the enforcement of foreign judgments was whether the claim was maritime in nature, rather than whether the judgment was rendered by a foreign admiralty court.

This case reflects the reality that different countries may have different ways to divide the functions of admiralty courts and to categorize maritime claims. If federal admiralty

1041 566 F 2d 482.
1042 566 F 2d 484.
1043 3 US 54 (1795).
1044 Gilmore and Black (1975) p.787, cited by Watson (1983) p.104.
1045 Ibid.
1046 708 F 3d 527 (2013).
1047 825 F 2d 709 (1987).

jurisdiction for the recognition and enforcement of foreign judgments is only determined by the origin of the foreign judgment, it is hard to avoid situations where the judgment is from a non-admiralty jurisdiction, but based upon the US law, it is clearly a maritime judgment nonetheless. Furthermore, if it is the nature of the claim that determines whether a foreign judgment is maritime or not, this gives rise to the question as to what should be the basis for such determination.

In 2014, there were two consecutive cases in which the federal admiralty courts addressed this difficult issue. Both cases concerned the enforcement of a foreign judgment on a freight forwarding agreement (FFA). The first one is *Flame S.A. v Freight Bulk Pte. Ltd.*.[1048] The judgment creditor sought enforcement of a judgment on an FFA agreement. It was argued that the underlying claim regarding the FFA dispute was not treated as a maritime claim under English law, therefore the enforcement of such judgment could not proceed before the American admiralty jurisdiction, and therefore the Rule B attachment was not applicable. However, the Federal Court of Appeals held that the underlying contract was a maritime contract under federal maritime law. Therefore, the federal admiralty jurisdiction could enforce the judgment.[1049]

When the case was discussed before the Fourth Circuit, the Second Circuit encountered a similar case. *D'Amico Dry Ltd. v Primera Maritime (Hellas) Ltd.*[1050] also concerned an English judgment in respect of an FFA dispute. The Second Circuit held that, "an action to enforce a foreign judgment is a separate civil action imposing its own jurisdictional requirements, and a suit to enforce a judgment rendered on a maritime claim is not itself maritime in nature."[1051] The court started with an explanation of the purpose of allowing enforcement of foreign maritime judgments under the federal admiralty jurisdiction. First, it could help to allocate maritime disputes to the expertise of the admiralty court. Second, it facilitates the uniformity of resolution in international maritime disputes and enhances international comity. Third, this helps to get rid of local judicial powers.[1052] Then the court held that, these purposes were far closer to "the maritime character of the underlying disputes" than to "the classification of the court that rendered the judgment".[1053] Therefore, whether a foreign judgment can be enforced under the federal admiralty jurisdiction depends on the maritime character of the underlying claim.[1054]

1048 762 F 3d 352 (4th Cir 2014).
1049 Ibid.
1050 756 F 3d 151 (2nd Cir 2014).
1051 Ibid.
1052 Ibid.
1053 Ibid.
1054 Ibid.

c Defining "foreign maritime judgments"

From the above cases, it is clear that the nature of the underlying claim was chosen as the standard to qualify a foreign judgment as a "maritime judgment". This raises the question of which law should be applied to determine the nature of the claim.

In this connection, US Federal courts unanimously hold that it is federal admiralty law rather than foreign law that determines the nature of the claim.[1055] Practically speaking, the parties may not be able to afford the expense of seeking expert evidence on foreign law. Therefore, invoking foreign law to determine the nature of the underlying claim can be quite troublesome. Also, for the sake of legal certainty, it was considered better to use federal admiralty law to determine the issue.[1056]

Moreover, also due to considerations on federal interests and policy, federal law should prevail. As held in *Flame*,[1057] "it could not have been the intention of Article III's grant of admiralty jurisdiction to place the rules and limits of maritime law under the disposal and regulation of foreign states."[1058] Finally, it has been held that the determination of the nature of the underlying claim is a procedural and jurisdictional issue, and that therefore federal law should be applied.[1059]

7.4.2.2 Enforcement action by Rule B

Where federal admiralty jurisdiction is established, foreign maritime judgments can be enforced based on admiralty procedures, especially the Rule B attachment,[1060] as provided in the Supplemental Rules of the Federal Civil Procedure.[1061] The procedures under the

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1055 *Flame SA v Freight Bulk Pte Ltd* 762 F 3d 352 (4th Cir 2014); *D'Amico Dry Ltd v Primera Maritime (Hellas) Ltd* 756 F 3d 151(2nd Cir 2014).

1056 Ibid.

1057 *Flame SA v Industrial Carriers, Inc* 24 F Supp 3d 493 (2014).

1058 Ibid.

1059 *Blue Whale Corp v Grand China Shipping Development Co* 722 F 3d 488 (2nd Cir 2013). Though it did not concern the enforcement of a foreign maritime judgment, the court held that the determination of the nature of a claim was "inherently procedural by virtue of its relationship to the courts' subject matter jurisdiction", therefore, federal admiralty law should be applied to determine the nature of the claim.

1060 Under Rule B, the plaintiff who has a prima facie *in personam* maritime claim may attach the defendant's vessel or property as security for his claim. The plaintiff has a *quasi in rem* jurisdiction over the defendant, provided that the defendant has property in the arrest jurisdiction, and he is not "found" in that jurisdiction and there is no statutory or other maritime law bar to the attachment, see in Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, see Title XIII Federal Rules of Civil Procedure, 28 U S C A. As the recognition and enforcement of foreign maritime judgments is considered as *in personam* maritime claim by American courts, the practice in this regard namely concerns Rule B.

1061 Initially, the Supreme Court promulgated the Rules of Practice in Admiralty and Maritime Cases, on December 20, 1920, effective March 7, 1921, which were revised, amended, and supplemented in accordance with the general unification of civil and admiralty procedure. In 1966, the Supplemental Rules for Certain Admiralty and Maritime Claim completely superseded the former. The title has been amended on April 12, 2006, effective December 1, 2006, now it is called Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, see Title XIII Federal Rules of Civil Procedure, 28 U S C A.

Supplemental Rules have many advantages. First, it is fast and easily accessible.[1062] Second, it is preferable for enforcement against judgment debtors who do not appear but whose assets are within the United States. Third, it always poses a financial burden on the assets of judgment debtors. To obtain the release of a ship or other assets from the attachment, parties tend to provide security.

In *International Seafood*,[1063] the Rule B attachment was employed in a suit merely for the enforcement of a judgment from the Barbados court against property of the defendant in the possession of an insurance company. The District court allowed the attachment to be vacated on the grounds that "the complaint presented simply a suit on a foreign money judgment". On appeal in the Fifth Circuit, Tuttle J confirmed that admiralty jurisdiction can be invoked to enforce a foreign maritime judgment on a sum of money. Therefore, the court allowed the enforcement procedure to be instituted by using the Rule B attachment. Since then, using Rule B to commence an enforcement proceeding has become common practice.[1064]

a A post-judgment mechanism?

The Rule B attachment has formally been provided for in the Supplemental Rules for Certain Admiralty and Maritime Claims since 1966. It was commonly viewed as a "pre-judgment mechanism" used by parties in admiralty cases "to obtain security for a potential judgment where the absent party's assets are transitory",[1065] or as "a method of obtaining *quasi-in-rem* jurisdiction over a defendant not otherwise subject to the court's jurisdiction".[1066]

In *Vitol*,[1067] the defendant argued that the Rule B attachment was a post-judgment mechanism. Therefore, it could be used to enforce foreign maritime judgments. However, the court held that the defendant's view was "a strained construction and contrary to a long line of precedent in admiralty cases". On the one hand, based on the text of the rule, there was no sign that Rule B was limited to a pre-judgment mechanism. On the other hand, it was held that the limited circumstances that could vacate a Rule B attachment did

1062 *Swift & Co, Packers v Compania Columbiana Del Caribe, S/A* 339 US 684 (1950) ("The issues of fact on which libellants' claim of fraud turn do not appear to be complicated and they may be speedily adjudicated by the District Court prior to a hearing on the affreightment contract."), see also in Advisory Committee Note on Rule A of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, 28 U S C A.

1063 566 F 2d 483 (5th Cir 1978).

1064 *International Sea Food Ltd v M/V Campeche* 566 F 2d 482 (5th Cir 1978); *Vitol SA v Primerose Shipping Co Ltd* 708 F 3d 527 (4th Cir 2013); *D'Amico Dry Ltd v Primera Maritime (Hellas) Ltd* 756 F 3d 151 (2nd Cir 2014); *Flame SA v Freight Bulk Pte Ltd* 762 F 3d 352 (4th Cir 2014); *Good Challenger Navagante SA v Metalexportimports SA* 2006 WL 7122409.

1065 *Williamson v Recovery Ltd. Partnership* 542 F 3d 43 (2nd Cir 2008).

1066 Ibid, see also Jarvis (1989) p.525.

1067 708 F 3d 527 (2013).

not mean that Rule B was not available after judgment. The court also held that it was hard to believe that "a plaintiff seeking to enforce a foreign admiralty judgment could avail itself of the courts of admiralty in the United States, yet be deprived of the use of the district court's power to attach assets: an 'inherent component of the admiralty jurisdiction given to the federal courts.'"[1068]

b Attitudes towards foreign maritime judgments in personam

In American practice, as expressed *in International Sea Food*,[1069] the enforcement of foreign maritime judgments insofar as those judgments involve "special prize or other peculiarly maritime remedies" is of little dispute. The most controversial area concerns foreign maritime judgments on a sum of money against a debtor, i.e. an *in personam* judgment.

In *The Centurion*,[1070] the court expressed its concern about giving enforcement of judgments *in personam*, as follows,

> "although the admiralty has a general jurisdiction over maritime contracts and quasi contracts, and things done on the sea, it does not follow that the payment of a debt in every form which it may assume can be enforced in the admiralty, simply because it originated in a contract, or in the performance of a service which was within the jurisdiction of the court. While the original cause or consideration subsists and is in force, the party may have his remedy in this court, but when that is extinguished and the debt passes into a new form, by what in the civil law is called a novation, as when the creditor receives a bond for the sum due, or a negotiable note, or bill of exchange is taken as payment, and as an extinguishment of the debt, it will not be contended that the admiralty has jurisdiction to enforce the payment of the debt in its new form."[1071]

The court eventually found an additional reason to establish admiralty jurisdiction to decide the case, and indirectly permitted the enforcement of foreign judgments *in personam* (paying a sum of money for his salvage services) under admiralty jurisdiction. Consistently,

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1068 Ibid.

1069 *International Sea Food Ltd v M/V Campeche* 566 F 2d 482 (1978).

1070 5 F Cas 369 (1839). It was addressed that "whether this court has authority to carry into execution an award of arbitrators, in a matter peculiarly of admiralty and maritime jurisdiction, it is not necessary to decide in this case, because it presents another ground upon which I think the jurisdiction of the court is free from doubt. The libellant in this case does not demand a specific sum which the master is alleged to have received to his use; he claims generally an unliquidated sum as a reward for his services as a salvor, the amount to be ascertained by a decree of the court. The libel is founded, therefore, strictly upon the maritime service, a consideration over which the court has an undisputed jurisdiction."

1071 5 F Cas 369 (1839).

in *International Sea Food*,[1072] the Fifth Circuit held that, whether or not the admiralty court has jurisdiction to enforce a foreign judgment *in personam* (on a sum of money) should partly depend on whether parties can successfully find a maritime aspect of the case to establish the admiralty jurisdiction. In that case, it is the marine insurance aspect of the case which adds a maritime flavour since admiralty jurisdiction has expertise in such matters.[1073]

From then on, the enforcement of foreign maritime judgments did no longer distinguish judgments *in rem* from judgments *in personam*. Where the enforcement concerned foreign maritime monetary judgments, the Rule B attachment can also be applied.[1074]

c Requirements

(1) Prima facie claim

To use the Rule B attachment to initiate the enforcement action, the plaintiff should first establish that the foreign judgments are above the standard for the *prima facie* maritime claim, as required.[1075]

In *Continental*,[1076] the standard of "probable cause" was applied to assess the *prima facie* claim. In *North of England P&I*,[1077] it was held that the standard was for the plaintiff to show that "the alleged is likely to be true". In *Flame*,[1078] it was held that the complaint should allege sufficient facts to support a reasonable belief for the attachment. Similarly, in *US v Mondragon*,[1079] it was held that the standard should be subject to the general standard that the complaint sufficiently notifies the defendant of the incident in dispute and affords a reasonable belief that the claim has merits.

In cases concerning the enforcement of foreign maritime judgments, the content of the *prima facie* claim is not "the foreign maritime judgment", but rather the claim of "enforcement of foreign maritime judgment". In this sense, the standard of *prima facie* claim can easily be met.[1080]

1072 *International Sea Food Ltd v M/V Campeche* 566 F 2d 482 (5th Cir 1978).

1073 *International Sea Food Ltd v M/V Campeche* 566 F 2d 482 (5th Cir 1978).

1074 *International Sea Food Ltd v M/V Campeche* 566 F 2d 482 (5th Cir 1978); *Vitol SA v Primerose Shipping Co Ltd* 708 F 3d 527; *D'Amico Dry Ltd v Primera Maritime (Hellas) Ltd* 756 F 3d 151; *Flame SA v Freight Bulk Pte Ltd* 807 F 3d 572.

1075 "The complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading." Fed R Civ P Adm Supp R E(2)(a), see in *Aqua Stoli Shipping Ltd v Gardner Smith Pty Ltd* 460 F 3d 445 (2nd Cir 2006); *Ms Adele Schifffahrtsgesellschaft mbH & Co KG v Wonderland Int'l Corp* 2010 WL 8932403.

1076 *Continental v Adriatic Tankers Shipping Co* 1995 WL 649942 (E D La 1995).

1077 *North of England Protecting and Indemnity Association v M/V Nara* 1999 WL 33116416.

1078 *Flame SA v Industrial Carriers, Inc* 24 F Supp 3d 493.

1079 313 F 3d 862 (4th Cir 2002).

1080 There are also exceptions. In cases concerning the enforcement of domestic maritime judgments, such as *In re Stolt-Nielsen Transportion Group* 2008 WL 650391 (2008), it concerned a default judgment entered

Even though a *prima facie* claim for the enforcement of foreign maritime judgments can satisfy the requirements of Rule B, the claim for the enforcement of an upcoming foreign maritime judgment is not recognized by admiralty jurisdiction. In a recent case *Zambrano v Vivir Seguros*,[1081] the plaintiff sought a Rule B attachment upon the claim of enforcing an upcoming foreign maritime judgment in Venezuela. The attachment was vacated by the admiralty court. It was held that "while it is true that "American courts have long and consistently held that admiralty jurisdiction was well-founded to enforce the judgments of foreign admiralty courts," "there is no foreign judgment here to be enforced".[1082]

(2) The defendant's absence

The location of the defendant is also relevant for seeking a Rule B attachment to enforce foreign maritime judgments. Specifically, the judgment debtor should not be found within the district of the court. According to the advisory committee notes in 1966, the rules have never attempted to give a clear definition for "not found within the district". Therefore, its meaning should be left to be decided on a case-by-case cases.[1083] In some cases, the defendant is not amenable to be served within the district, the court only considers the situation as "not found within the district". By contrast, in some other cases, only where the defendant is not physically present in the district and cannot be personally served, the requirement can be satisfied.[1084]

Moreover, it should be noted that the rules on service can interfere with the use of Rule B. In *Maritrans*,[1085] the plaintiff sought to attach a ship based on Rule B for the enforcement of a monetary judgment against a foreign defendant in relation to collision damage. However, the corporate defendant argued that "the Clerk of the State Corporation Commission is statutorily appointed under the Virginia Code to accept service of process". Therefore, he is "found within the district under Supplemental Admiralty Rule B". The district court held that this interpretation would thwart the policy of quick and easy maritime attachment under Rule B. However, the broad interpretation of "found within the district" was confirmed by the Fourth Circuit. Therefore, in the 2005 Amendment of the Supplemental Rules, the time for determining whether a defendant is "found" in the

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by the district court. Therefore, the application of attachment for relief was denied by the court. This implies that a default judgment is not or not necessarily qualified as a *prima facie* claim. The court held that, "enforcing a default judgment against a Turkish corporation in Turkey is not likely to succeed … Pursuing foreign defendants in their home countries is simply a cost of international business and we do not find it appropriate to stretch American admiralty rules and to distort the judgment collection procedures of New York state so that a Dutch company has a better chance of collecting from a Turkish company."

1081 2016 WL 4720447 (D C Florida).

1082 Ibid.

1083 Supplemental Admiralty and Maritime Claims Rule B, 28 U S C A, advisory committee's note.

1084 Bederman and Mallinson (1996) p.353-354.

1085 *Maritrans Operating Partners Ltd. Partnership v M/V Balsa 37* 64 F 3d 150 (4th Cir 1995).

district is set at the time of filing the verified complaint that requests attachment and the affidavit required by Rule B.[1086]

(3) Notice required by the Due Process Clause

Before 1985, it was not required that notice should be given to the defendant to invoke the Rule B attachment, as the speciality of admiralty proceedings made it widely acceptable for these to be instituted *ex parte* and without advanced notice and hearing.[1087] However, then it was held that it was a violation of due process if the defendant had no actual knowledge and no right to defend in respect of the institution of the proceedings.[1088] As not only maritime assets are easily movable, the procedure under the admiralty jurisdiction should not be special.[1089] In the 1985 Amendment of the Supplemental Rules , the notice to the defendant was added.[1090] Given this, a judgment debtor should be given notice before a Rule B attachment is invoked to commence an enforcement action.[1091]

7.4.3 Preliminary summary

In the US, procedurally speaking, recognition of foreign judgments can be sought by raising a separate action. If the purpose of recognition of foreign judgments is to enforce the judgments, it has been widely accepted under the US law that the jurisdiction of the court in which an enforcement action is brought can be justified either by having personal jurisdiction over the defendant or by the presence of the assets of the judgment debtors.

With regard to foreign maritime judgments, the case law shows that a maritime-judgment creditor is entitled to invoke the specialized admiralty procedure, namely the Rule B attachment, to get a judgment enforced against the ships or other assets of the judgment debtor. The threshold is that the underlying claim is a maritime claim

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1086 Rule B 2005 Amendment.

1087 *Polar Shipping, Ltd v Oriental Shipping Corp* 680 F 2d 627 (9th Cir 1982); *Schiffahrtsgesellschaft Leonhardt & Co v A Bottacchi SA de Navegacion* 732 F 2d 1543 (11th Cir 1984); *Amstar Corp v S/S Alexandros T* 664 F 2d 904 (4th Cir 1981); *Merchants National Bank of Mobile v The Dredge General GL Gillespie* 663 F 2d 1338 (5th Cir 1981).

1088 *Grand Bahama Petroleum Co v Canadian Transportation Agencies, Ltd* 450 F Supp 447 (1978).

1089 Rutherglen (1989) p.544.

1090 In the 1985 Amendment, "Rule B (1) has been amended to provide for judicial scrutiny before the issuance of any attachment or garnishment process. Its purpose is to eliminate doubts as to whether the Rule is consistent with the principles of procedural due process enunciated by the Supreme Court.", see Gensler (2017) on Appendix C Rule B.

1091 Rule B (2) (a) on "Notice to Defendant", it provides that "no default judgment may be entered except upon proof – which may be by affidavit – that: (a) the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4; (b) the plaintiff or the garnishee has mailed to the defendant the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt; or (c) the plaintiff or the garnishee has tried diligently to give notice of the action to the defendant but could not do so."

recognized by the US law. While the procedure of action *in rem* in English law is more favourable to foreign judgment *in rem*, the Rule B attachment by its nature is favourable to judgments *in personam*.

7.5 Concluding remarks

Based on the above investigation, Brussels Ibis offers the simplest procedure for the recognition of foreign judgments, irrespective of whether the judgments need enforcement or not. Under English law, there are two main ways to initiate the procedure of recognition of foreign judgments, namely by raising an action or by registration. Even though the procedure of registration is also straightforward, it only applies to foreign judgments which fall within the scope of the 1920 Act and 1933 Act, and under which a sum of money needs to be enforced. Under the US law, recognition of foreign judgments generally proceeds through a separate action instituted by the judgment creditor. If the purpose of recognition of foreign judgments is to enforce the judgment, the US law requires the court in which the action is raised either to have personal jurisdiction over the defendant or the presence of the judgment debtors' assets within the jurisdiction. In contrast, such jurisdiction requirements are not necessary under English law.

In all three jurisdictions, special arrangements and considerations concerning maritime judgments apply. Under Brussels Ibis, the considerations mainly concern whether the recognition and enforcement of foreign maritime judgments should be subject to the specialized rules under the international maritime convention. From the previous practice and the legislative efforts of the EU, it can be concluded that, even though two EU member states are bound by the same international maritime convention, the recognition and enforcement of foreign maritime judgments needs to follow the requirements and procedure under Brussels Ibis. This undoubtedly guarantees the efficiency of the recognition and enforcement process of maritime judgments.

In terms of the practice in the two common law jurisdictions, they both have specialized admiralty procedures, i.e. the action *in rem* and the Rule B attachment. A judgment creditor can invoke these procedures to commence the proceeding for the realization of foreign maritime judgments. The common core of these two admiralty procedures is that they are specialized for maritime matters, therefore they are easily accessiable and can pose a direct financial burden on the judgment debtors.

Compared with the general procedures, the initiation of the specialized admiralty procedures follows special considerations of the court addressed. Under English law, the central question for the English admiralty court to consider before allowing an action *in rem* for recognition and enforcement of a foreign maritime judgment, is whether this maritime judgment can be enforced against the ship subject to an arrest. In this regard, if

a maritime-judgment creditor successfully shows that the foreign judgment is of *in rem* nature and the ship to be arrested belongs to the maritime-judgment debtor, it is more likely for him to be allowed to raise an action *in rem* to get his judgment recognized and enforced. Under the US law, the certral question for the court to consider before issuing a Rule B attachment for the recognition and enforcement of a foreign maritime judgments is whether the foreign judgment is of "maritime" nature under the US law. Furthermore, the Rule B attachment is more suitable for the recognition and enforcement of maritime judgments *in personam*.

Compared with the general procedure, the specialized procedures both have limited applicable scope due to the considerations of the courts and their statutory requirements. The English admiralty court seems more constrained than the American counterpart, given the fact that the English case law is used less frequently, and there have been no newly-reported cases since the 1980s. Nevertheless, the special admiralty procedures do serve as a possible and efficient alternative for maritime-judgment creditors to seek recognition and enforcement of the judgment cross border in England and Wales and the US.

8 Observations and Concluding Remarks

Following the investigation in previous chapters, this chapter will draw some observations and conclusions on how to better use the mechanism of recognition of foreign judgments in \.

8.1 Traditional aspect of recognition of foreign judgments

The first, as well as the traditional application of the mechanism of recognition of foreign judgments, is a prior step for cross-border enforcement. In Chapter 2, there is discussion of the situation where the selected jurisdictions have different views on recognition of foreign judgments where enforcement is sought.

By comparison, it can be found that the rules on the recognition and enforcement of foreign judgments in the selected jurisdictions have all been very much codified, which encourages the development of the practice. The uniform multilateral rules are incomparably more favourable for the recognition and enforcement of foreign judgments than national unilateral rules. Under Brussels Ibis, recognition of foreign judgments is a mandatory obligation. The mutual trust between EU member states lays the basis for the automatic recognition regime, which allows a broad scope of judgments to be recognized, with only a limited scope for refusal grounds. Compared with the other two jurisdictions, English law is in between the two and relatively friendly to foreign judgments. The English statutes are essentially assemblies of multiple bilateral agreements between the UK and countries that have political connections with the UK, such as countries belonging to the Commonwealth of Nations and previously the British Empire. Some of the rules seem outdated when compared with the other two, such as the limited scope of indirect jurisdictionadmiralty rules. However, it provides more stability and predictability to private litigants. The English common law rules for the recognition and enforcement of foreign judgment are basically in line with the statutes. However, courts have more discretion to decide whether to recognize and enforce a foreign judgment under the common law than under the statutes; for example, a court has discretion to decide the meaning of a natural justice violation and whether and in which way it can be used to resist recognition of a foreign judgment by a judgment debtor. In the US, under the guidance of the two Uniform Acts, half of the states have codified the rules in this field. The US law seems favourable to foreign judgments; for example, it has a broad scope of indirect jurisdiction rules to

review the jurisdiction of the court and a strict interpretation of fraud. However, as a matter of fact, it leaves too much room for courts to use their discretion to supervise the recognition of foreign judgments. For example, a court could consider the appropriateness of the jurisdiction of the foreign court based on its understanding of due process or the doctrine of *forum non conveniens*.

8.2 Recognition of the preclusive effect of foreign judgments

An often-ignored aspect of the mechanism of recognition of foreign judgments lies in its relation with the preclusive effect of foreign judgments. This kind of procedural effect of foreign judgments is similar to the *res judicata* effect of domestic judgments. However, when it comes to the transnational litigation arena, the recognizing court has more discretion to decide whether and to what extent a foreign judgment could have a similar *res judicata* effect on a local proceeding.

Generally speaking, the selected jurisdictions all have a theoretical basis for recognizing the preclusive effect of foreign judgments and have their respective approaches. Under Brussels Ibis, based on the interpretation of the concept of recognition as illustrated by *Hoffmann v Krieg*,[1092] recognition of foreign judgments is a process which confers foreign judgments with the authority and effectiveness accorded to them in the court of origin. This means that if a foreign judgment has some preclusive effect in the state of origin, it can be recognized by the court addressed. And it further follows that the law of the court of origin should be applied to determine the preclusive effect of foreign judgments. Under English law, it is said that if a foreign judgment satisfies all requirements for recognition, it can be treated in the same way as a domestic judgment, either for enforcement or in being conclusive between the parties. Based on this line of thinking, English law favours a unilateral approach, referring to its own local rules to determine to what extent the preclusive effect of foreign judgments can be recognized. Under the US law, two competing doctrines coexisted to justify the preclusive effect of foreign judgments. One is borrowed from the practice concerning sister-state judgments. It generally requires that a foreign judgment should be given recognition to the same extent as a judgment of a court of another state. It follows that the preclusive effect of foreign judgments should be decided based on the law of the court of origin. The other approach is based on a policy-oriented analysis, which emphasizes the role of local laws in determining the preclusive effect of foreign judgments. Given these two parallel approaches, the law of the court of origin and the local law are equally important in theory. If the foreign judgment is raised before a federal court, the court may even choose between federal law and state law.

1092 (Case-145/86) [1988] ECR 645.

After examining the practice regarding how courts in the selected jurisdictions decide whether and to what extent the claim preclusion effect of foreign judgments can be recognized, it can be found that an autonomous preclusive effect can be detected in Brussels Ibis, and that English and American courts have a similar preference to local rules to ascertain the preclusive effect of foreign judgments. However, with the local rules giving increasing claim preclusion effect to judgments, American courts tend to refer to foreign law in order to avoid giving greater preclusive effect to foreign judgments than these have in the court of origin. The recognition of the claim preclusion effect of foreign judgments is also related to the purpose of re-litigation. In all three selected jurisdictions, courts tend to recognize the claim preclusion effect of foreign judgments to preclude re-litigation for contradictory results. Where re-litigation is only for enforcing a foreign judgment and if the foreign judgment falls within a statutory framework for enforcement, a court will also recognize the claim preclusion effect of the foreign judgment, as has been shown by the practice under the Brussels Ibis and the English 1933 Act. However, if re-litigation is initiated for seeking additional satisfaction, courts in the selected jurisdictions rarely recognize the claim preclusion effect of foreign judgments, unless the foreign judgment has already been satisfied.

As to the recognition of the issue preclusion effect of foreign judgments, the so-called leading approaches are not strictly adopted by courts in the selected jurisdictions. Under Brussels Ibis, in specific cases, the court addressed only refers to foreign substantive rules to decide the exact content of the "issues" rather than foreign preclusion law to decide whether the issue should have an issue preclusion effect. Moreover, Brussels Ibis grants autonomous issue preclusion effect to foreign judgments, in particular, regarding the determination on jurisdiction. English courts still have a preference for the unilateral approach to recognize the issue preclusion effect of foreign judgments based on English law. In practice, the issue preclusion effect of foreign judgments has become a useful tool for judgment creditors to prevent repetitive attacks against the validity of foreign judgments. American courts are less consistent in determining the issue preclusion effect of foreign judgments. They tend to choose an approach based on practical needs on a case-by-case basis. In some cases, they are cautious about applying their laws to give a broader issue preclusion effect to foreign judgments. In some other cases, they will also refer to the law of the court of origin, such as, for denying the issue preclusion effect.

Apart from divergences in choice of law, the understanding of the requirements for the preclusive effect of foreign judgments in each jurisdiction is also variable. In most cases, courts rely on concepts from civil procedure rules to determine whether the preclusive effect of foreign judgments should be recognized, such as the same cause of action, the same parties, or the same issues. As these concepts are already hard to define in the context of domestic law, the interpretation of these concepts is far more difficult in cases concerning foreign judgments and foreign litigations. Not only do courts need to consider the meanings

of these concepts in the domestic law context, but also, they need to take the foreign origins of these judgments into account.

Due to the unavoidable process of choice of law, the inconsistency between the leading approach and practice, and the problematic interpretation of the main legal concepts, it is not surprising that the practice of the recognition of the preclusive effect of foreign judgments is not as evident as the practice of the recognition for the enforcement of foreign judgments. This causes an imbalanced development of the two aspects of recognition.

Nonetheless, the practice in the selected jurisdictions has also shed some light on how to improve the situation. Among the three selected jurisdictions, the practice under the Brussels Ibis illustrates that, if uniform rules could give some weight to the preclusive effect of foreign judgments, it would be the most straightforward way to confirm such effects. Under Brussels Ibis, even though there are no rules explicitly prescribing the preclusive effect of foreign judgments, courts of the member states have noted the autonomous preclusive effect under the Regulation. The process of choice of law can also be avoided in recognizing the autonomous preclusive effect of foreign judgments.

8.3 Recognition of foreign judgments with constitutive effect and its significance

Based on the practice in the field of maritime law, it can be found that, unlike those judgments that ascertain a sum of money payable from one party to another, there are some judgments with constitutive effect, namely granting a certain legal situation or legal status to the holders of the judgments, such as the judgments on the constitution of a limitation fund[1093] and the judgments on foreign judicial sales of ships.[1094] The recognition practice regarding these judgments broadens our understanding of the effectiveness of recognition of foreign judgments in transnational litigation.

In this case, the subject matter of recognition essentially is the legal situation or legal status ascertained by the foreign court. Without the assistance of the recognition regime, the legal situation or status can hardly be preserved or can easily be disrupted in a different jurisdiction. In practice, it is helpful for a party to rely on the mechanism of recognition of foreign judgments to preserve the legal effect ascertained by the court of origin. If a court grants recognition to such a judgment, it means that the party is entitled to request the court addressed to preclude all intervening acts that may affect the legal outcome of the foreign judgment. And when the legal effect of the foreign judgment has been affected

1093 See Chapter 6 Section 6.3.3.
1094 See Chapter 6 Section 6.4.2.

by certain acts, the party is entitled to request the court addressed to restore the *status quo ante*.

8.3.1 The role of the law applied by the foreign court

Based on Chapter 2, it can be found that, in cases concerning the recognition of foreign monetary judgments, whether the foreign court applies the right laws, including the right choice of law rules, is not a common basis for the refusal of the recognition of foreign judgments. Nevertheless, it may still be possible for a judgment creditor to invoke other refusal grounds, for example, the public policy exception, to resist the detrimental effects of the foreign judgment in the court addressed.

In contrast, the appropriateness of the law applied by the foreign court is closely related to the recognition of foreign judgments with constitutive effect. The reason lies in that, unlike a foreign judgment on a sum of money payable from one party to another, the constitutive effect determined by the law applied by the foreign court is the main content of the foreign judgment. If the court addressed has a different view of the applicable law on the main dispute underlying the foreign judgment, or if the decision reached by the foreign law leads to an unacceptable outcome in the view of the court addressed, it is less likely that the court addressed will give recognition to that judgment.

In some cases, the law applied by the court of origin will directly lead to a refusal of recognition of a judgment with constitutive effect. For example, in cases concerning the recognition of foreign judicial sales of ships,[1095] even though in a state of origin, based on the law applied by the court of origin, a judicial sale of a ship could result in a clean title on a ship free from any encumbrances and charges, the effect of such a judicial sale would be challenged or ignored in the court addressed as long as this court holds a different view on applicable law. For this reason, the drafting of an international instrument is underway to improve the situation. However, so far the drafters of the Third Revision Draft have still avoided touching upon the applicable law issues that are related to the effect of judicial sales of ships. And they also intentionally avoid unifying the effect of judicial sales of ships under the national laws of the state parties. Instead, they adjusted the applicable scope of the Third Revision Draft only to judicial sales of ships after which a court of a state party grants a clean title to the purchaser of the ship.

The crucial role of the law applied (including the choice of law rules) by the court of origin in recognition of foreign judgments with constitutive effect can also be shown by the limitation of liability cases. In these cases, a liable person prefers to choose a court in a state that follows the 1996 LLMC rather than in a non-contracting state, to constitute a

1095 See Chapter 6 Section 6.4.2.3.

limitation fund, and if the judgment on the constitution of a limitation fund is recognized by another court from a different state, the immunity effect resulting from the constitution of a limitation fund as provided by the 1996 LLMC could benefit the liable person. Otherwise, the ships and other assets of the liable person are exposed to endless arrests or attachments. Based on the case law under Brussels Ibis, it can be found that under Brussels Ibis, the differences in the laws between the court of origin and the court addressed do not lead to the refusal of recognition of foreign judgments with constitutive effect. Nevertheless, beyond Brussels Ibis, it is less likely that the court addressed will still give recognition to a foreign judgment on the constitution of a limitation fund regardless of whether its own law provides otherwise.

8.3.2 Significance of recognition of foreign judgments with constitutive effect

As shown in the cases concerning foreign judgments with constitutive effect, the recognition of foreign judgments of this kind can help the judgment holders to preserve the rights or legal situation ascertained by the foreign court as a way of protecting them from the acts that may affect their acquired rights or legal situation. Therefore, as for the private litigants, it is plausible to make use of the tool of recognition of foreign judgments as a shield to preclude all the intervening acts that may limit the effect of the foreign judgment and fully realize their rights and interest that have been acquired. If it concerns an act that has affected the acquired rights or legal situation ascertained by the foreign court in some states, the judgment holder should be aware of the possibility of applying the tool of recognition of foreign judgment as a sword to request the court addressed to call a halt to the intervening acts and restore the *status quo ante* ascertained by the foreign judgment.

8.4 Tendency towards recognition of foreign provisional measures

The subject matter of recognition mainly concerns final judgments, rather than judgments of a provisional nature.[1096] For practical needs, provisional measures are often given in relation to acts or things abroad. As foreign provisional measures are normally not final and can be changed at a later stage, on the national law level, whether to give effect to these provisional measures used to be at the discretion of the court addressed.[1097] And it was

1096 See Chapter 2 Section 2.4.
1097 Collins (1992), ff.106.

even viewed as a violation of the territory of law if a foreign provisional measure is given exterritorial effect and enforced by a local court.[1098]

In the context of Brussels Ibis, with the objective of facilitating of the recognition and enforcement of foreign judgments, the recognition of foreign provisional measures is possible. Based on the maritime cases, the practical significance of the recognition of provisional measures is obvious. In cases concerning ship arrest orders,[1099] as the ships and other assets of the shipowner are usually widely distributed, it is possible for a shipowner to seek recognition of the effect of a foreign ship arrest order to preclude a repetitive arrest if the law of the court of origin grants a broad prohibitive effect to a ship arrest order. As ships can easily flee, it is also practical and effective for a maritime creditor to directly seek the enforcement of a foreign ship arrest order to facilitate the realization of his claim without re-applying for a ship arrest in the court addressed. Moreover, where a provisional measure, such as a ship arrest order, is denied by a foreign court, it is possible for the shipowner to seek recognition of the denial decision in precluding a repetitive measure against his assets.[1100]

As the exterritorial effect of provisional measures requires a higher level of deference from the court addressed to the court of origin, the recognition of provisional meausres is rarely accepted by national laws,[1101] and this is also why it can be explicitly provided by Brussels Ibis where mutual trust serves as a fundamental basis.

8.5 Procedures for the recognition of foreign judgments

Brussels Ibis offers the simplest procedure for the recognition of foreign judgments, no matter whether the judgments need enforcement or not. A judgment creditor can directly raise a foreign judgment from a member state before a court of another member state for recognition or before a competent enforcement authority of another member state for enforcement, with the required copy of the judgment and certificate. Under English law, there are two main ways for the recognition of foreign judgments, namely by raising an action or by registration. The way of registration is straightforward, but it only applies to foreign monetary judgments which fall within the scope of the 1920 Act and 1933 Act, i.e. judgments from countries that have political connections with the UK. Under the US law, recognition of foreign judgments is generally proceeded through raising a separate action

1098 Case no. CPF 8553/2015/4 / CA3 "C., E. s/medida cautelar" Juzgado n° 1 - Secretaría n° 1, AMARA CRIMINAL Y CORRECCIONAL FEDERAL, nos Aires, 16 de junio de 2020, more information on the case can be found in https://conflictoflaws.net/2020/same-region-two-different-rulings-on-fake-news-at-the-internet/ accessed 18 July, 2021.

1099 See Chapter 6 Section 6.2.4.1 and Section 6.2.5.

1100 See Chapter 6 Section 6.2.4.2.

1101 See Chapter 6 Section 6.2.3.1.

by the judgment creditor. If the purpose of recognition of foreign judgments is to enforce the judgment, the US law requires the court in which the action is raised to have either personal jurisdiction over the defendant or the presence of the judgment debtors' assets within the jurisdiction. In contrast, such requirement of jurisdiction is not necessary under English law.

With regard to foreign maritime judgments, even though there are international maritime conventions that also regulate the issue of recognition and enforcement of foreign judgments, the simple procedure of Brussels Ibis does not defer to any specialized maritime conventions. The recognition and enforcement of a foreign maritime judgment deriving from a maritime convention to which two member states are parties, should always be in line with the procedure as prescribed under Brussels Ibis.

In England and Wales and the US, the specialized admiralty procedures, i.e. action *in rem* and Rule B attachment, offer an additional option for the holders of foreign maritime judgments to get their judgments enforced. Compared with the general procedures, the initiation of the specialized admiralty procedures follows different considerations of the court addressed. Under English law, the central question for the English admiralty court to consider before allowing an action *in rem* for recognition and enforcement of a foreign maritime judgment is whether this maritime judgment can be enforced against the ship subject to an arrest. In this regard, if a maritime-judgment creditor successfully shows the foreign judgment *in rem* in nature and the ship to be arrested belongs to the maritime-judgment debtor, it is more likely for him to seek an action *in rem* to get his judgment recognized and enforced. Under the US law, the certral question for the court to consider before issuing a Rule B attachment for the recognition and enforcement of a foreign maritime judgment is whether the foreign judgment is a "maritime" judgment in the eyes of the US law. Furthermore, the Rule B attachment is especially suitable in cases where the foreign maritime judgment is *in personam*.

As these specialized admiralty procedures are easily accessible and can directly pose a financial burden on the assets of judgment debtors, the application of these admiralty procedures may speed up the whole process of recognition and enforcement, and may even lead the maritime-judgment debotors to fulfil their obligations spontaneously.Furthermore, the specialized procedures both have limited applicable scope. Compared with the American counterpart, the English admiralty court seems more constrained and does not intend to expand the application of action *in rem* for the recognition and enforcement of foreign maritime judgments, given the fact that the number of cases of the English case law is smaller and there have been no newly-reported cases since the 1980s. Nevertheless, as for maritime-judgment creditors, the special admiralty procedures do serve as a good supplement for them to seek recognition and enforcement of foreign maritime judgments in England and Wales and the US more efficiently.

8.6 Final Conclusion

As Lord Rodger once said, "the logic of the law is that recognition is the necessary primary concern". This research shows how the mechanism of recognition of foreign judgments can be optimized in order to become the primary concern in transnational litigation.

First, the mechanism of recognition of foreign judgments can be optimized through a further enhancement of the multilateral judicial cooperation between states worldwide. As shown by the experience of the Brussels Ibis, the multilateral approach, compared with the national unilateral approach, is undoubtedly better for foreign judgments to be recognized cross the border, in terms of its limited heads of refusal grounds, limited discretion of member states courts given the uniform interpretation competence of the ECJ, and the simple procedure for the recognition of foreign judgments and so on.

Secondly, the mechanism of recognition of foreign judgments can be optimized by establishing rules to regulate the preclusive effects of foreign judgments. Recognition of foreign judgments has different effects and can serve the benefits of private litigants in transnational litigation in different ways. Enforcement of foreign judgments is undoubtedly a possible result after a judgment is recognized, especially where the judgment determines a sum of money payable from one party to another. However, a court must recognize every foreign judgment which it enforces, but it need not enforce every foreign judgment which it recognizes. Recognition of foreign judgments can have an effect to preclude a local proceeding, and a certain issue that has been determined by a foreign court may be precluded from being litigated again in a local proceeding. Even though the Brussels Ibis offers an autonomous preclusive effect to foreign judgments, and the English and the US courts have a similar preference to grant some preclusive effects to foreign judgments based on their local laws, it is generally not easy for a judgment creditor to raise the issue of recognition of foreign judgments in order to seek the preclusive effects of a foreign judgment in a proceeding of another state. Only by establishing more rules in this field, can the preclusive effects of foreign judgments be enhanced, so the function of the mechanism of recognition of foreign judgments be improved.

Thirdly, the mechanism of recognition of foreign judgments can be optimized if the application of recognition of foreign judgments with constitutive effects and to foreign provisional measures can be further excavated and extended to more jurisdictions based on the experience of the EU. As shown by the maritime cases, it is practical for a maritime-judgment creditor to take the initiative to seek recognition of a foreign judgment with constitutive effects in order to preserve the rights and interests he has acquired before a foreign court, to preclude subsequent intervening acts that may affect his acquired rights and interests, and to request restoration of the *status quo ante* when his rights and interests have been infringed. Furthermore, for a maritime-judgment creditor, it is also practical to seek the exterritorial effect of a foreign provisional measure to facilitate the realization

of a claim. It should be noted that, if there are no principles or overarching objectives as Brussels Ibis has, such as the principle of mutual trust, the principle of conferring on foreign judgments full authority and effectiveness, and the objective of facilitating the enforcement of foreign judgments, a higher level of deference from a court of a state to a court of another will be very difficult to achieve. It will be hard for a court of a state to recognize the full effects of a foreign judgment with constitutive effects that were determined based on the law chosen by a court of another state or a provisional measure granted by a court of another state.

Fourthly, the mechanism of recognition of foreign judgments can be optimized through making use of the general and specialized procedures for the recognition of foreign judgemnts. Apart from the general procedures for the recognition of foreign judgments, the maritime practice shows that, there are specialized admiralty procedures that offer an additional option for a maritime-judgment creditor to commence a proceeding for the recognition and enforcement of a foreign maritime judgment. These specialized admiralty procedures, namely action *in rem* in England and Wales and Rule B attachment in the US, are not only easily accessible but also can directly pose a financial burden on the assets of maritime-judgment debtors. They are effective means in the sense that they will probably lead the judgment debtors to fulfill their legal obligations spontaneously.

Laws evolve as practice develops. To keep pace with the unavoidable trend of globalization, it is expected that courts from different jurisdictions could give more credits to foreign judgments, to respect their full effect, and to secure legal certainty internationally. It is also expected that private litigants could realize the values of the mechanism of recognition of foreign judgments and have a better use in transnational litigation.

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Summary

In order to reveal how to optimize the mechanism of recognition of foreign judgments in transnational litigation in the EU, England and Wales and the US, this study focuses on the different forms of application and the possible legal effects of recognition of foreign judgments in international litigation. The practice of recognition of foreign maritime judgments is also included in order to further illustrate whether there could be any peculiarities in the recognition of judgments in a specific field of law and how the recognition of foreign judgments serve to achieve the objectives/values of certain legal mechanisms in a specific field.

Besides the introduction and conclusion, the research is composed of three parts. Part I and Part II are discussions of the recognition of foreign judgments in general, while Part III focuses mainly on the recognition of maritime judgments. Part I discusses and makes a comparison between the minimum requirements and possible refusal grounds for the recognition of foreign judgments under English law, the US law and the Brussels Ibis. Part II consists of three chapters. Chapter 3 provides a general theoretical discussion on the prevailing approaches that the court addressed might take to grant a preclusive effect to foreign judgments in the selected jurisdictions. This chapter is the basis for the following two chapters. Chapter 4 examines the recognition of the claim preclusion effect of foreign judgments. Based on case law, it is explored how and to what extent the court addressed in the selected jurisdictions gives claim preclusion effect to foreign judgments. Chapter 5 covers the recognition of the issue preclusion effect of foreign judgments. It examines how and to what extent the court addressed in the selected jurisdictions gives issue preclusion effect to foreign judgments. Part III moves to the specific area of maritime law and consists of two chapters. Chapter 6 examines how the recognition of foreign judgments can be used in the three different typical maritime scenarios. It also examines and clarifies how recognition law interacts with maritime law and how recognition of foreign judgments enhances the effect of maritime judgments in international maritime litigations. Chapter 7 discusses from a procedural perspective how the recognition of foreign judgments is achieved procedurally and what are the peculiarities in the procedures of recognition of foreign maritime judgments.

Part I explores the basis on which requirements and/or refusal grounds a court decides to give its recognition or its denial to a foreign judgment under English law, the US law and the Brussels Ibis. It appears that the requirements and refusal grounds are mainly designed for the review of foreign monetary judgments with particular enforcement purposes. In the three selected jurisdictions, the common core is that courts are willing to respect the effect of foreign judgments and assist their extra-territorial enforcement.

Among the three selected jurisdictions, Brussels Ibis is the most favourable framework for the recognition of foreign judgments. The rules under Brussels Ibis are consistent and closely related to the common purpose of promoting the free movement of foreign judgments. The uniform and binding jurisdiction rules enhance the recognition mechanism in that they pave the way for the limited review of jurisdiction within its framework. The refusal grounds are limited and are strictly interpreted. Due to the principle of prohibiting review of the substance of the case, the refusal grounds mainly concern procedural unfairness. The strict interpretation requires that only manifest breaches of the procedural rights of parties can lead to the non-recognition of foreign judgments. Moreover, a party whose procedural rights have been infringed in the court of origin can only invoke refusal grounds if (s)he has made efforts to seek remedies in the court of origin.

English law, compared with the other two, is in between the two and fairly friendly to foreign judgments. The rules for recognition in current English law date back to the 19th Century, and some of them seem outdated, such as the rules for jurisdiction review and the rules on the defence of fraud. However, there are two sides to every coin. Even though the rules are somewhat outdated, they do provide stability and predictability.

The US law, which is regularly updated, is superior in several aspects, such as its approach to the fraud defence, the limited application of public policy exception. However, since the US law on the recognition of foreign judgments is evolving towards increased discretion of the court addressed, it seems to be the least favourable concerning the recognition of foreign judgments among the three. This can also be demonstrated by the adoption of a new basis for refusal, i.e. the judgment was rendered in circumstances that raised substantial doubt about the integrity of the rendering court with respect to the judgment, and by the fact that the US law allows the courts to use their discretion to review the jurisdiction of the foreign court, or even to refuse the recognition of a foreign judgment on the ground of *forum non conveniens*. Although the discretionary power of American courts can be justified by the increasing possibilities that the jurisdiction of a foreign court may be accepted, the excessive discretionary power of American courts is the most troubling factor that frustrates the cross-border movement of judgments in the US.

Part II focuses on other possible effects of recognition of foreign judgments, especially in terms of the claim preclusion effect and the issue preclusion effect. There are different theoretical bases and prevailing approaches in dealing with the preclusive effect of foreign judgments in the selected three jurisdictions. Under Brussels Ibis, the interpretation of the concept of recognition implies that the recognition not only paves the way for the enforcement purposes but also transfers the effect of foreign judgments from the court of origin to the court addressed, which includes the preclusive effect of foreign judgments. English law takes a unilateral approach based on its own standards as to the preclusive effect of judgments. Its logic is that if a foreign judgment can be recognized, it is treated in the same way as domestic judgments concerning its preclusive effect before English

courts. Under the US law, two alternative approaches prevail. One is based upon the analogous treatment of sister-state judgments within the United States, and the other upon a public-policy-oriented analysis.

The different approaches lead to different outcomes with regard to the applicable law. The prevailing approach under Brussels Ibis and the US law seem more balanced than that under English law. Both of the former recognize that foreign law is appropriate to determine the preclusive effect of foreign judgments. At the same time, the law of the court addressed is not ignored. Nonetheless, there are still differences between the two. Under Brussels Ibis, the application of foreign laws is an obligation of the member states whereas the application of local laws is only supplementary in order to guarantee that foreign judgments will not have greater effect in the court addressed than in the court of origin. Under the US law in contrast, the local law can be the only source to determine the preclusive effect of foreign judgments, for the sake of policy considerations. The English unilateral approach straightforwardly gives more weight to its own domestic law. This simplifies the process of determining the applicable law compared to Brussels Ibis and the US law. Moreover, the fact that the English court grants such an effect solely upon the standards of English law is justified on the grounds that greater preclusive effect would be given there than its counterparts. However, as English case law reflects an increasing awareness of the need to apply foreign laws, it seems that convergence is occurring between all the three legal systems.

Nevertheless, courts in the selected jurisdictions do not always adopt the prevailing approaches with regard to granting claim preclusion effect to foreign judgments. It seems that a crucial element concerning the courts' recognition of the claim preclusion effect of foreign judgments is the purpose of re-litigation. Under Brussels Ibis, foreign judgments are granted certain autonomous claim preclusion effects based on the interpretation of the objectives of Brussels Ibis, specific provisions, and holdings of the ECJ. This autonomous claim preclusion effect of foreign judgments precludes re-litigation for a contradictory result as well as for enforcement of foreign judgments. English courts adopt a unilateral approach to recognize the claim preclusion effect of foreign judgments. This implies that English law is used to determine the claim preclusive effect of foreign judgments. In theory, a recognized foreign judgment should have the same claim preclusion effect as domestic judgments. In practice however, foreign judgments have an absolute effect only to preclude re-litigation for contradictory results, whereas this is less so with regard to re-litigation for additional satisfaction. Finally, if a foreign judgment falls within the scope of statutory recognition frameworks, it also precludes re-litigation for enforcement purposes. Even though there are two prevailing approaches under American law, American courts tend to follow the first approach, i.e. to recognize the claim preclusion effect of foreign judgments based on the local rules. Based on the 'rule of bar', American courts recognize the effect of foreign judgments in terms of precluding re-litigation for a contradictory result. As the

'rule of merger' does not apply to foreign judgments, American courts will not recognize the effect of foreign judgments in precluding re-litigation for additional satisfaction. Neither does the US law recognize the effect of precluding re-litigation for enforcement of foreign judgments. However, with the increasing scope of the claim preclusion effect under the US law, there appears a trend that American courts change to the second approach to determine the claim preclusion effect of foreign judgments in order not to give them greater effect than they are accorded by the law of the court of origin.

Regarding the specific requirements for invoking the claim preclusion effect in the selected jurisdictions, the scope of same causes of action and same parties varies when the claim preclusion effect of foreign judgments is invoked for different purposes. As the autonomous claim preclusion effect of judgments under Brussels Ibis is achieved from the interpretation of the objectives, *lis pendens* rule and case law, it does not rely on any national laws. This makes it easy for parties to attain such autonomous effect. The practice under Brussels Ibis also shows that if the claim preclusion effect of foreign judgments can be clearly provided in a uniform way, the significance of the first action will be further increased. However, this may also foster a race for judgment. Outside of the uniform rules, the unilateral approach adopted by English courts is effective in the sense that courts will not be troubled with the meaning of foreign laws and the parties will not bear the burden of proof of foreign laws. Furthermore, the effect of foreign judgment under English law can be easily predicted. However, the disadvantage lies in that a judgment may have lesser or greater effect than it has in the country of origin. With regard to the American practice, it is laudable that American courts now turn to a more international view to give claim preclusion effect to foreign judgments in accordance with the law of the court of origin. However, it should be admitted that this approach expects a higher capacity from the party who wants to invoke the claim preclusion effect, as he is required to prove the foreign law. If the party cannot fulfil his burden of proof, American courts will still follow the local rules and assume the local rules are the same as foreign laws. If this happens, the party has to bear the consequences of the broad claim preclusion effect of judgments and be deprived of the rights to litigate in the US.

In all three jurisdictions, a foreign judgment can be used to preclude a subsequent proceeding in which a contradicting result is sought. Brussels Ibis seems most favourable for such effect, as one of the objectives of Brussels Ibis is to minimize conflicting judgments between EU member states, while under English law and the US law, whether a party can invoke such an effect is basically left to the court's discretion. In terms of the effect of foreign judgments in precluding re-litigation for additional satisfaction, Brussels Ibis is silent about this, while English law has the tendency to enhance such an effect of foreign judgments. As he US law has broadened its scope of claim preclusion due to its change in the understanding of the concept of cause of action, American courts are more likely to refer to foreign laws to resist such an effect rather than to rely on local rules to sustain this

effect. In terms of the effect of foreign judgments in precluding re-litigation for enforcement of judgments, the ECJ confirmed such an effect under Brussels Ibis. This is also the case if the foreign judgment falls within the two English statutes. Under the English common law and the US law however, a party's re-litigation with an enforcement purpose can hardly be precluded.

Similar to the practice of giving claim preclusion effect to foreign judgments, courts in the selected jurisdiction do not strictly apply the leading approaches when giving issue preclusion to foreign judgments. Under Brussels Ibis, the differences in the scope of issue preclusion among the member states make it challenging to apply the leading approach. Where the law of the court of origin has a narrower scope of issue preclusion than the law of the court addressed, the court addressed is supposed to use its law to give the same or equivalent effect to foreign judgments. Where the law of the court of origin has a broader scope of issue preclusion than the law of the court addressed, the prevailing approach provides no guidance to the court addressed to determine the issue preclusion effect. Nevertheless, in some cases the court addressed only refers to foreign substantive rules to decide the exact content of the 'issues' rather than to foreign preclusion law to decide whether the issue should have a preclusive effect. Moreover, Brussels Ibis grants certain autonomous issue preclusion effects to its judgments, i.e. regarding the determination on jurisdiction.

Outside of the uniform rules, English courts hold on to their unilateral approach to determine the issue preclusion effect of foreign judgments. The issues concerned are those fundamental to the previous decisions. As for domestic judgments, issues that should have been raised and decided by the previous court can have issue preclusion effect, while it is not the case for foreign judgments. The identity of issues is determined based on the identity of 'the facts, circumstances and arguments' supporting the issues. The differences between the law of the court of origin and the law of the court addressed do not affect the identity of issues. In principle, the English courts consider the requirement of the same parties for issue preclusion as necessary. Moreover, special circumstances, such as newly-found evidence, change of law, and the input-output ratio of the parties to litigate in the foreign country also have implications for English courts to give issue preclusion effect to foreign judgments.

American courts are more diverse in determining the issue preclusion effect of foreign judgments. American courts may adopt either of two leading approaches based on the practical needs of the case. In some cases, for example, they are cautious to apply the law of the court addressed to give broader issue preclusion effect to foreign judgments. In other cases, the reference to foreign law is a good excuse to deny foreign judgments preclusive effect. Under the US law, the issues that can be the subject matter of issue preclusion should have been actually litigated and actually decided. The issues should be essential to the previous judgments in order to guarantee that sufficient care has been

taken by the court of origin and that the vigorous litigation has taken place between the parties. The identity of issues requires both identical facts and identical rules. In case of foreign judgments, differences between the law of the court origin and the law of the court addressed do not necessarily prevent the issues from being identical. Compared with English practice, the most notable characteristic of American practice is that American courts tend to abandon the requirement of the same parties, especially in federal courts and in some state courts. This does not necessarily mean that the US law relaxes its standards on giving issue preclusion effect to judgments. American courts set additional limits to avoid injustice arising from the abandonment of the requirement of the same parties. Finally, before giving preclusive effect to foreign judgments, American courts will also take into account remedies of the party before the court of origin, practical difficulties of the party to litigate in the court of origin as well as some policy considerations, i.e. avoiding the duplication of effort and protecting litigants from the harassing or evasive tactics of their opponents.

In general, the issue preclusion effect of foreign judgments in the selected jurisdictions is limited. The common law countries take the lead to recognize the binding effect as to the determination of specific issues by a prior court. Except for several specific issues, such as the issue of jurisdiction, the common law courts have wider discretion which makes the process rather subtle. In cases concerning issue preclusion, the subsequent action will usually concern a different cause of action from the first action. If the court addressed defers too much to the determinations of a foreign court, this equates to compelling the parties to contest every minor issue thoroughly in a foreign court at the penalty of being bound by that result forever and ever more. Nonetheless, it is still expected that, in line with the general evolution of recognition law, the court addressed can limit their discretion to a reasonable extent and allow the parties to make full use of the issue preclusion effect of foreign judgments and obtain protection from repetitive litigation on specific issues.

Part III focuses on the practice of recognition of foreign maritime judgments. The variety of substantive rules of maritime law leads to several typical maritime judgments. The scheme of recognition of foreign judgments, not only serves as an amplifier for the effect of certain maritime judgments, either final or provisional, but also serves to achieve the objectives of some important legal mechanisms in the field of maritime law. In cases concerning ship arrest, the recognition of a foreign ship arrest order could provide certain protection to a shipowner from a re-arrest of the ship or other ships that he owns. And even in cases where a prior arrest is denied, it is also possible for the shipowner to seek the recognition of the arrest denial to preclude a repetitive arrest application. In cases concerning limitation of liability, the recognition of a foreign order on the constitution of a limitation fund can be sought before a court to preclude a further arrest of the ship or attachment on the assets of the liable person. If the arrest or attachment has been executed, the liable party may seek an order to release the ship or assets or return the guarantee. In

cases concerning foreign judicial sales of ships, recognition of the effects of a foreign judicial sale of a ship means that the court addressed should preclude all the intervening arrests based on the pre-sale claims by former creditors or by the previous owner. If the ship has been arrested based on pre-sale claims or the title of the previous owner, the court should order the release of the ship or return the guarantee for the release of the ship. The above cases all illustrate the function of recognition of foreign judgments to preserve the legal effect of a foreign judgment ascertained by a foreign court. By making use of the tool of recognition of foreign judgments, a party is entitled to request the court addressed to preclude all intervening acts that may affect the legal effect of the foreign judgment. When the legal effect of the foreign judgment is affected by certain acts, the party is entitled to request the court addressed to restore the *status quo ante*.

Beyond the above, when recognition of foreign judgments encounters certain maritime rules and the shipping practice, the concept of recognition of foreign judgments seems to have more variations of which the meaning is expanding. For example, in cases concerning the recognition of foreign liability judgments by a fund court, a fund court may consider the local limitation rules in order to decide to what extent a foreign liability judgment should be recognized in the context of the proportional distribution of the fund over the creditors. In cases of the recognition of foreign judicial sales of ships, recognition of foreign judgments not only refers to the court's recognition, but also the recognition by administrative bodies, i.e. ship registries, in the context of de-registration and re-registration of the ship, to guarantee the clean title of the ship purchaser.

Procedurally speaking, Brussels Ibis offers the simplest procedure for the recognition of foreign judgments, irrespective of whether the judgments need enforcement or not. Under English law, there are two main procedures for recognition of foreign judgments, namely by initiating an action or by registration. Even though the procedure of registration is also straightforward, it only applies to foreign judgments which fall within the scope of the 1920 Act and 1933 Act, and under which a sum of money needs to be enforced. Under the US law, recognition of foreign judgments generally proceeds through a separate action instituted by the judgment creditor. If the purpose of recognition of foreign judgments is to enforce the judgment, the US law requires the court in which the action is raised either to have personal jurisdiction over the defendant or the presence of the judgment debtors' assets within the jurisdiction. In contrast, such jurisdiction requirements are not necessary under English law.

In terms of the procedure for recognition and enforcement of foreign maritime judgments, some particularities exist in common law jurisdictions. As the two selected common law countries both have specialized admiralty procedures, i.e. under English law the action *in rem* and under the US law the Rule B attachment, a judgment creditor can invoke the specialized admiralty procedure to enforce a foreign maritime judgment provided that the requirements for these procedures are satisfied. The specialized admiralty

procedures in the two common law jurisdictions are both easily accessible and can directly impose a financial burden on the assets of judgment debtors as well. Therefore, they serve as an additional option for a maritime-judgment creditor to seek enforcement of the judgment cross border. However, the two specialized procedures both have limited applicable scope. Compared with the American counterpart, the English admiralty court sets more limits on the application of action *in rem* to enforce a foreign maritime judgment.

Samenvatting

Om te onderzoeken hoe het mechanisme van erkenning van buitenlandse vonnissen in transnationale procesvoering kan worden geoptimaliseerd in de EU, Engeland en Wales, de VS. Dit heeft als doel om de eigen betekenis van het leerstuk van de erkenning van buitenlandse vonnissen in het internationaal privaatrecht zichtbaar te maken. Daarbij wordt ook stilgestaan bij hoe erkenning van buitenlandse vonnissen in de praktijk werkt om te illustreren hoe bepaalde rechtsgebieden aanleiding kunnen geven tot bijzonderheden en hoe erkenning van buitenlandse vonnissen kan bijdragen aan het verwezenlijken van de doelstellingen/waarden van bijzondere rechtsfiguren in bepaalde rechtsgebieden.

Afgezien van de inleiding en conclusie bestaat het proefschrift uit drie delen. In delen I en II wordt de erkenning van buitenlandse vonnissen in het algemeen behandeld, terwijl in deel III bijzondere aandacht uitgaat naar de erkenning van zeerechtelijke vonnissen. Deel I bespreekt en vergelijkt de minimum vereisten en mogelijke weigeringsgronden met betrekking tot de erkenning van buitenlandse vonnissen naar Engels recht, Amerikaans recht en de Brussel Ibis Verordening. Deel II bestaat uit drie hoofdstukken. Hoofdstuk 3 biedt een algemene theoretische bespreking van de heersende benaderingen die een aangezochte rechter zou kunnen kiezen om blokkerende werking (*preclusive effect*) te verlenen aan buitenlandse vonnissen in de gekozen rechtstelsels. Dit hoofdstuk vormt de basis waarop de twee volgende hoofdstukken voortbouwen. Hoofdstuk 4 behandelt de erkenning van de blokkerende werking van buitenlandse vonnissen ten opzichte van rechtsvordering (*claim preclusion effect*). Op basis van een analyse van de rechtspraak wordt onderzocht hoe en in welke mate de aangezochte rechter in de gekozen rechtsstelsels blokkerende werking jegens rechtsvorderingen toekent aan buitenlandse vonnissen. Hoofdstuk 5 behandelt de erkenning van de blokkerende werking van buitenlandse vonnissen ten aanzien van geschilpunten (*issue preclusion effect*). Onderzocht wordt hoe en in welke mate de aangezochte rechter in de gekozen rechtstelsels blokkerende werking ten aanzien van geschilpunten toekent aan buitenlandse vonnissen. Deel III richt zich op het bijzondere terrein van het zeerecht en bestaat uit twee hoofdstukken. Hoofdstuk 6 onderzoekt hoe erkenning van buitenlandse vonnissen toegepast kan worden in drie verschillende, typisch zeerechtelijke scenario's. Daarbij wordt tevens de wisselwerking tussen erkenningsregels en zeerecht onderzocht en verduidelijkt, alsmede hoe erkenning van buitenlandse vonnissen de werking van zeerechtelijke vonnissen in de internationale maritieme rechtspraktijk kan bevorderen. Hoofdstuk 7 bespreekt vanuit een procesrechtelijk perspectief hoe de erkenning van buitenlandse vonnissen plaats vindt en bijzonderheden van de procedures tot erkenning van buitenlandse vonnissen.

Deel I onderzoekt op grond van welke vereisten en/of weigeringsgronden een rechter beslist om een buitenlands vonnis al dan niet te erkennen naar Engels recht, Amerikaans recht en de Brussel Ibis verordening. Daarbij blijkt dat de vereisten en weigeringsgronden voornamelijk zijn ontworpen voor de beoordeling van de tenuitvoerlegging van buitenlandse vonnissen inzake geldvorderingen. De drie gekozen rechtstelsels hebben gemeen dat de rechters bereid zijn om de rechtsgevolgen van buitenlandse vonnissen te erkennen en mee te werken aan hun tenuitvoerlegging in andere jurisdicties. Van de drie gekozen rechtstelsels biedt de Brussel Ibis het meest gunstige kader voor de erkenning van buitenlandse vonnissen. De regels van Brussel Ibis zijn consequent en nauw verbonden met het gemeenschappelijke doel om het vrij verkeer van buitenlandse vonnissen te bevorderen. De eenvormige en bindende bevoegdheidsregels bevorderen het erkenningsmechanisme doordat zij de weg bereiden voor een beperkte toetsing van de bevoegdheid binnen het eigen kader. De weigeringsgronden zijn beperkt en worden strikt uitgelegd. Vanwege het verbod op het onderzoeken van de juistheid van een beslissing, betreffen de weigeringsgronden hoofdzakelijk procedurele onrechtvaardigheid. De strikte uitleg brengt mee dat uitsluitend kennelijke schendingen van de processuele rechten van partijen kunnen leiden tot het onthouden van erkenning aan buitenlandse vonnissen. Voorts kan een partij wiens procedurele rechten zijn geschonden bij de rechter van herkomst zich alleen dan beroepen op weigeringsgronden, indien hij heeft geprobeerd rechtsmiddelen in te stellen bij de rechter van herkomst.

Engels recht, neemt, vergeleken met de andere onderzochte rechtstelsels een tussenpositie in en is tamelijk welwillend tegenover buitenlandse vonnissen. De huidige Engelse erkenningsregels stammen uit de 19e eeuw en sommige regels zijn verouderd, zoals de regels inzake toetsing van de bevoegdheid en het fraudeverweer. De keerzijde van de medaille is evenwel dat de regels weliswaar enigszins verouderd zijn, maar ook stabiliteit en voorspelbaarheid bieden.

Het Amerikaanse recht, dat regelmatig wordt vernieuwd, is diverse opzichten beter zoals de benadering van het fraudeverweer en de beperkte toepassing van de openbare orde exceptie. Aangezien evenwel Amerikaans recht inzake de erkenning van buitenlandse vonnissen zich ontwikkelt in de richting van toenemende beoordelingsvrijheid van de aangezochte rechter, lijkt het toch het minst gunstig voor de erkenning van buitenlandse vonnissen van de drie. Dit blijkt onder meer uit de aanvaarding van een nieuwe weigeringsgrond, namelijk dat het vonnis is gewezen onder omstandigheden die aanleiding geven tot aanmerkelijk twijfel omtrent de integriteit van de rechter van herkomst met betrekking tot het vonnis. Het blijkt ook uit het gegeven dat Amerikaans recht de rechters beoordelingsvrijheid laat om de bevoegdheid van de buitenlandse rechter te toetsen en zelfs om een buitenlands vonnis erkenning te onthouden op grond van *forum non conveniens*. Hoewel de discretionaire bevoegdheid van de Amerikaanse rechters gerechtvaardigd kan worden door de toenemende mogelijkheden dat de bevoegdheid van

een buitenlandse rechter zal worden aanvaard, blijft de overmatige discretionaire bevoegdheid van de Amerikaanse rechters de meest problematische omstandigheid die het grensoverschrijdende verkeer van vonnissen in de Verenigde Staten dwarsboomt.

Deel II richt zich op andere mogelijke rechtsgevolgen van de erkenning van buitenlandse vonnissen, in het bijzonder de blokkerende werking jegens rechtsvorderingen (*claim preclusion*) en geschilpunten (*issue preclusion effect*). Er bestaan verschillende theoretische grondslagen en heersende benaderingen met betrekking tot de blokkerende werking van buitenlandse vonnissen in de gekozen drie rechtstelsels. Onder Brussel Ibis, volgt uit de uitleg van het begrip erkenning dat erkenning niet alleen de weg bereidt voor de tenuitvoerlegging maar dat het tevens de rechtsgevolgen van het buitenlandse vonnis doet overgaan van de rechter van herkomst naar de aangezochte rechter met inbegrip van de blokkerende werking. Engels recht volgt een unilaterale benadering die uitgaat van de eigen maatstaven ten aanzien van de blokkerende werking van buitenlandse vonnissen. De achterliggende gedachte is dat indien een buitenlands vonnis kan worden erkend, het ten aanzien van de blokkerende werking door de Engelse rechter op dezelfde wijze wordt behandeld wordt als binnenlandse vonnissen. Naar Amerikaans recht zijn twee alternatieve benaderingen heersend. De ene is gebaseerd op een analoge behandeling met vonnissen van zusterstaten binnen de Verenigde Staten, terwijl de ander berust op een analyse van wat het algemeen belang meebrengt.

De diverse benaderingen leiden tot verschillende uitkomsten ten aanzien van het toepasselijke recht. De heersende benadering onder Brussel Ibis en Amerikaans recht lijkt evenwichtiger dan die naar Engels recht. Eerstgenoemden erkennen dat het wenselijk is dat buitenlands recht de blokkerende werking van buitenlandse vonnissen bepaalt. Tegelijkertijd wordt het recht van de aangezochte rechter niet uit het oog verloren. Niettemin bestaan er verschillen tussen de twee. Onder Brussel Ibis, is de toepassing van buitenlands recht een verplichting van de lidstaten, waarbij de toepassing van het eigen recht alleen een aanvullende rol speelt om te waarborgen dat buitenlandse vonnissen niet een grotere werking hebben bij de aangezochte rechter dan bij de rechter van herkomst. Naar Amerikaans recht daarentegen, kan – in het kader van de toetsing aan het algemeen belang – het eigen recht de enige rechtsbron zijn om te bepalen of een buitenlands vonnis blokkerende werking heeft. In de Engelse unilaterale benadering weegt het eigen recht zonder meer zwaarder. Dit vereenvoudigt het proces van het bepalen van het toepasselijke recht vergeleken met Brussel Ibis en Amerikaans recht. Bovendien kan het feit dat de Engelse rechter blokkerende werking toekent aan buitenlandse vonnissen op grond van de maatstaven van het Engelse recht worden gerechtvaardigd doordat hierdoor een grotere blokkerende werking wordt gegeven dan onder de andere onderzochte rechtstelsels. Aangezien evenwel de Engelse rechtspraak een toenemend bewustzijn laat zien van de noodzaak om buitenlands recht toe te passen, lijken de drie onderzochte stelsels naar elkaar te convergeren.

Hier staat evenwel tegenover dat rechters in de aangezochte rechtstelsels niet altijd de heersende benaderingen volgen met betrekking tot het aan buitenlandse vonnissen verlenen van blokkerende werking tegen rechtsvorderingen. Een beslissend aspect bij de erkenning van de blokkerende werking van buitenlandse vonnissen tegen rechtsvorderingen lijkt te zijn het oogmerk van hernieuwde berechting (*relitigation*). Onder Brussel Ibis wordt aan buitenlandse vonnissen een zekere autonome blokkerende werking verleend op grond van de uitleg van de doelstellingen en bijzondere bepalingen van de Brussel Ibis verordening en de rechtspraak van het Europese Hof van Justitie. Deze autonome blokkerende werking van buitenlandse vonnissen sluit hernieuwde berechting zowel uit om een tegengestelde uitkomst te bereiken als bij de tenuitvoerlegging van buitenlandse vonnissen. Engelse rechters passen een unilaterale benadering bij de erkenning van de blokkerende werking van buitenlandse vonnissen. Dit brengt mee dat Engels recht gewend is aan het verlenen van blokkerende werking aan buitenlandse vonnissen. Althans in theorie zou een buitenlands vonnis dezelfde blokkerende werking dienen te hebben als binnenlandse vonnissen. In de praktijk echter hebben buitenlandse vonnissen alleen absolute blokkerende werking wanneer het er om gaat om hernieuwde berechting uit te sluiten om een tegengestelde uitkomst te verkrijgen, terwijl dit in mindere mate het geval is indien de hernieuwde berechting ertoe strekt om aanvullende vorderingen in te stellen (*additional satisfaction*). Tot slot is – binnen de reikwijdte van wettelijke erkennings-regelingen – hernieuwde berechting om een tegengestelde uitkomst te bereiken ook uitgesloten. Hoewel er naar Amerikaans recht twee heersende benaderingen bestaan, passen Amerikaanse rechters overwegend de eerste benadering toe, d.w.z. dat erkenning van de blokkerende werking van buitenlandse vonnissen geschiedt op basis de eigen rechtsregels. Op grond van de 'rule of bar' erkennen Amerikaanse rechters de rechtsgevolgen van buitenlandse vonnissen met betrekking tot het blokkeren van hernieuwde berechting om een tegengestelde uitkomst te verkrijgen. Aangezien de 'rule of merger' niet van toepassing is op buitenlandse vonnissen, zullen Amerikaanse rechters niet erkennen dat buitenlandse vonnissen blokkerende werking hebben tegen hernieuwde berechting om aanvullende vorderingen in te stellen. Evenmin erkent Amerikaans recht de blokkerende werking ten aanzien van hernieuwde berechting bij de tenuitvoerlegging van buitenlandse vonnissen. Evenwel gelet op de toenemende reikwijdte van de blokkerende werking jegens rechtsvorderingen naar Amerikaans recht lijkt er sprake van een tendens onder Amerikaanse rechters om de tweede benadering toe te passen om de blokkerende werking van buitenlandse vonnissen te bepalen met het doel om aan deze vonnissen niet een grotere werking te verlenen dan deze genieten onder het recht van de rechter van herkomst.

Ten aanzien van de bijzondere vereisten die in de gekozen rechtstelsels gelden bij het inroepen van de blokkerende werking jegens rechtsvorderingen, verschilt de reikwijdte van de begrippen 'hetzelfde onderwerp en dezelfde oorzaak' en 'dezelfde partijen' naar gelang de doeleinden waarvoor de blokkerende werking wordt ingeroepen. Aangezien

onder Brussel Ibis de autonome blokkerende werking van buitenlandse vonnissen berust op de uitleg van de doelstellingen van de verordening, de litispendentie-regel en rechtspraak, speelt nationaal recht geen rol. Dit maakt het makkelijker voor partijen om blokkerende werking te bereiken. De praktijk onder Brussel Ibis laat ook zien dat indien de blokkerende werking van buitenlandse vonnissen op heldere en eenvormige wijze kan worden verleend, het belang van de oorspronkelijke procedure verder toeneemt. Dat kan echter aanzetten tot een wedloop om als eerste een vonnis te verkrijgen (*race for a judgment*). Afgezien van de eenvormige regels, is de unilaterale benadering van de Engelse rechters doelmatig in die zin dat de rechter zich niet hoeft te verdiepen in de uitleg van buitenlands recht en dat de partijen niet de bewijslast hoeven te dragen ten aanzien van buitenlands recht. Voorts is naar Engels recht de blokkerende werking van buitenlandse vonnissen gemakkelijk te voorspellen. Een nadeel is evenwel dat de blokkerende werking van een buitenlands vonnis groter of kleiner kan zijn dan in het land van herkomst. Ten aanzien van de Amerikaanse praktijk valt te prijzen dat Amerikaanse rechters toenemend een internationaal perspectief kiezen door blokkerende werking aan buitenlandse vonnissen toe te kennen overeenkomstig het recht van de rechter van herkomst. Toegegeven moet echter worden dat deze benadering veronderstelt dat hogere eisen gesteld kunnen worden aan de partij die zich beroept op blokkerende werking, aangezien deze de inhoud van het buitenlands recht dient te bewijzen. Slaagt een poartij niet in deze bewijslast, dan zullen Amerikaanse rechters nog altijd de eigen regels toepassen en veronderstellen dat deze overeenkomen met het buitenlandse recht. In dat geval moet deze partij de gevolgen van de ruime blokkerende werking dragen en kan hem het recht worden onthouden om te procederen in de Verenigde Staten.

In alle drie de onderzochte rechtstelsels kan een buitenlands vonnis worden gebruikt om een daaropvolgende procedure gericht op het verkrijgen van een tegengestelde uitkomst uit te sluiten. Brussel Ibis lijkt het meest bevorderlijk voor dit doel, aangezien het een van de doelstellingen van Brussel Ibis is om de mogelijkheid van tegenstrijdige beslissingen van EU-lidstaten tot een minimum te beperken, terwijl het naar Engels en Amerikaans recht in wezen ter beoordeling van de rechter is gelaten of een buitenlands vonnis blokkerende werking heeft. Waar Brussel Ibis zwijgt ten aanzien van de blokkerende werking van buitenlandse vonnissen tegen hernieuwde berechtiging om aanvullende rechtsvorderingen in te stellen, bestaat naar Engels recht een tendens om een dergelijke blokkerende werking van buitenlandse vonnissen te bevorderen. Aangezien Amerikaans recht de reikwijdte heeft verbreed van de blokkerende werking ten aanzien van rechtsvorderingen door de gewijzigde uitleg van het begrip 'cause of action', zullen Amerikaanse rechters eerder een beroep doen op buitenlands recht om blokkerende werking te onthouden, dan op het eigen recht om deze werking te verlenen. Met betrekking tot de blokkerende werking van buitenlandse vonnissen tegen hernieuwde berechting bij de tenuitvoerlegging van vonnissen, heeft het Europese Hof van Justitie zulks bevestigd onder Brussel Ibis. Hetzelfde geldt indien het buitenlandse vonnis binnen de reikwijdte

valt van de beide Engelse wetten. Daarentegen valt onder de Engelse common law en Amerikaans recht hernieuwde berechting bij de tenuitvoerlegging vrijwel niet te vermijden.

Evenals bij aan buitenlandse vonnissen verlenen van blokkerende werking tegen rechtsvorderingen, passen rechters in de gekozen rechtstelsels bij het verlenen van blokkerende werking ten aanzien van geschilpunten (*issue preclusion effect*) niet altijd strikt de heersende benaderingen toe. Onder Brussel Ibis, maken de verschillen tussen de lidstaten in de reikwijdte van de blokkerende werking ten aanzien van geschilpunten het moeilijk om van een heersende benadering te kunnen spreken. Waar het recht van de rechter van herkomst een beperktere uitleg kent dan het recht van de aangezochte rechter, dient de aangezochte rechter het eigen recht te gebruiken om dezelfde of een gelijkwaardige werking te verlenen aan buitenlandse vonnissen. Waar het recht van de rechter van herkomst een ruimere uitleg heeft dan het recht van de aangezochte rechter biedt de heersende benadering geen richtsnoer aan de aangezochte rechter om de blokkerende werking ten aanzien van geschilpunten te bepalen. Niettemin, in sommige gevallen verwijst de aangezochte rechter alleen naar buitenlands materieel recht om te beslissen wat de precieze inhoud is van de geschilpunten (*issues*) en niet om te bepalen of naar buitenlands recht aan het geschilpunt blokkerende werking toekomt. Bovendien verleent Brussel Ibis een zekere autonome blokkerende werking aan buitenlandse vonnissen ten aanzien van geschilpunten, namelijk met betrekking tot de beoordeling van de bevoegdheid.

Buiten het eenvormige recht houden Engelse rechters vast aan hun unilaterale benadering om te bepalen of buitenlandse vonnissen blokkerende werking toekomt ten aanzien van geschilpunten. Bij dit laatste gaat het om geschilpunten die van fundamenteel belang zijn voor de eerdere beslissingen. Bij binnenlandse beslissingen kunnen geschilpunten die aan de orde gesteld en beslist hadden moeten worden door de eerdere rechter blokkerende werking toekomen, maar dit geldt niet voor buitenlandse vonnissen. Of het om hetzelfde geschilpunt gaat wordt bepaald op grond van het overeenkomen van de feiten, omstandigheden en argumentaties waarop het geschilpunt steunt. Verschillen tussen het recht van de rechter van herkomst en het recht van de aangezochte rechter doen er niet aan af dat sprake is van hetzelfde geschilpunt. In beginsel beschouwen Engelse rechters het vereiste dat het moet gaan om dezelfde partijen als noodzakelijk om van blokkerende werking ten aanzien van het geschilpunt te kunnen spreken. Voort kunnen bijzondere omstandigheden, zoals nieuw ontdekt bewijs, wetswijzigingen en de verhouding tussen wat partijen in de buitenlandse procedure hebben ingebracht en wat er uit is gekomen gevolgen hebben voor de vraag of de Engelse rechter blokkerende werking toekent aan het buitenlandse vonnis ten aanzien van het geschilpunt.

Amerikaanse rechters zijn meer verschillend in hun benadering van de blokkerende werking van buitenlandse vonnissen. Zij kunnen op grond van de praktische vereisten van een zaak een van de beide heersende benaderingen kiezen. In sommige gevallen letten zij er op om het recht van de aangezochte rechter toe te passen om aldus een bredere

blokkerende werking te verlenen aan het buitenlandse vonnis ten aanzien van het geschilpunt. In andere gevallen, vormt de verwijzing naar buitenlands recht een goed excuus om aan buitenlandse vonnissen blokkerende werking te onthouden. Naar Amerikaans recht dient over de geschilpunten waar blokkerende werking betrekking op heeft, daadwerkelijk te zijn geprocedeerd en beslist. De geschilpunten dienen essentieel te zijn voor de eerdere uitspraken om te waarborgen dat voldoende zorg is betracht door de rechter van herkomst en dat hierover krachtig is geprocedeerd door de partijen. Om te kunnen spreken van hetzelfde geschilpunt dienen de feiten en de regels identiek te zijn. Bij buitenlandse vonnissen, verhinderen verschillen tussen het recht van de rechter van herkomst en het recht van de aangezochte rechter niet noodzakelijk dat het om hetzelfde geschilpunt gaat. Vergeleken met de Engelse praktijk, is het meest opmerkelijke kenmerk van de Amerikaanse praktijk dat Amerikaanse rechters ertoe neigen om het vereiste van dezelfde partijen los te laten, in het bijzonder bij de federale gerechten en bij sommige rechters van staten. Dit betekent niet noodzakelijk dat Amerikaans recht zijn maatstaven versoepelt inzake het verlenen van blokkerende werking aan vonnissen ten aanzien van geschilpunten. Amerikaanse rechters stellen aanvullende grenzen om onrecht te voorkomen welke ontstaat uit het loslaten van het vereiste van dezelfde partijen. Tenslotte zullen Amerikaanse rechters, voordat zij overgaan tot het verlenen van blokkerende werking aan buitenlandse vonnissen, in aanmerking nemen welke rechtsmiddelen de partij had voor de rechter van herkomst, praktische moeilijkheden die de partij had bij het procederen voor de rechter van herkomst, alsmede beleidsoverwegingen, te weten het vermijden van een duplicatie van inspanningen en het beschermen van partijen tegen intimiderend en ontwijkend gedrag van hun wederpartijen.

Over het algemeen is in de gekozen rechtstelsels het blokkerend effect van buitenlandse vonnissen ten aanzien van een geschilpunt beperkt. De common law-landen gaan voorop in het erkennen van beslissingen over bepaalde geschilpunten door een eerdere rechter. Afgezien van een aantal bijzondere geschilpunten, zoals de bevoegdheid, hebben de common law rechters veel beoordelingsvrijheid, waardoor dit een subtiel proces wordt. On gevallen waar de blokkerende werking ten aanzien van geschilpunten aan de orde komt, zal de latere procedure veelal een ander onderwerp en andere oorzaak hebben dan de eerdere procedure. Indien de aangezochte rechter te veel afgaat op de vaststellingen van de buitenlandse rechter, komt dit er op neer partijen te dwingen om elk ondergeschikt punt diepgaand te betwisten voor de buitenlandse rechter op straffe voor altijd gebonden te zijn aan de uitkomst. Niettemin valt te verwachten dat overeenkomstig de algemene ontwikkeling in het erkenningsrecht, de aangezochte rechter zijn beoordelingsvrijheid redelijkerwijs zal inperken en aan partijen zal toestaan om volop gebruik te maken van de blokkerende werking van buitenlandse vonnissen ten aanzien van geschilpunten en beschermd te worden tegen herhaalde berechting van bepaalde geschilpunten.

Deel III is gericht op de praktijk bij de erkenning van buitenlandse zeerechtelijke vonnissen. De verscheidenheid aan materiële zeerechtelijke regels heeft geleid tot diverse typisch zeerechtelijke vonnissen. Het systeem van erkenning bij buitenlandse vonnissen vormt niet alleen een versterker van de rechtsgevolgen van bepaalde zeerechtelijke vonnissen, of dit nu voorlopige of eindbeslissingen zijn, maar helpt ook om de doelstellingen te verwezenlijken van enkele belangrijk juridische instrumenten op het terrein van het zeerecht. In gevallen betreffende scheepsbeslag, kan de erkenning van een buitenlandse beslagbeslissing aan de scheepseigenaar bescherming bieden tegen herhaalde beslaglegging van het schip of andere schepen die hij in eigendom heeft. En zelfs in gevallen waar eerder beslagverlof is geweigerd, is het mogelijk voor de scheepseigenaar om erkenning te vragen van de weigering van het beslagverlof om herhaalde beslagverzoeken uit te sluiten. In gevallen betreffende beperking van aansprakelijkheid, kan erkenning van een buitenlands gerechtelijk bevel om een beperkingsfonds te vormen worden gevorderd ten overstaan van een rechter om verdere beslaglegging op het schip of beslaglegging op andere vermogensbestanddelen van de aansprakelijke persoon. Als het beslag is gelegd, kan de aansprakelijke persoon vragen om een bevel tot opheffing van het beslag op het schip of andere vermogensbestanddelen of tot teruggave van de garantie. In gevallen betreffende buitenlandse gerechtelijke verkopen van schepen, betekent erkenning van de rechtsgevolgen van een buitenlandse gerechtelijke verkoop van een schip dat de aangezochte rechter alle inbreuk makende beslagen gebaseerd op vorderingen van schuldeisers van de vorige eigenaar daterend van voor de gerechtelijke verkoop, dient uit te sluiten. Wordt beslag op het schip gelegd voor vorderingen van voor de gerechtelijke verkoop of steunend op de eigendom van de vorige scheepseigenaar, dan dient de rechter te bevelen dat het beslag wordt opgeheven of dat een eventuele garantie wordt terug gegeven. Voornoemde gevallen illustreren dat erkenning van buitenlandse vorderingen kan dienen om de rechtsgevolgen van een buitenlands vonnis gewezen door een buitenlandse rechter te beschermen. Door gebruik te maken van het instrument van de erkenning van buitenlandse vonnissen is een partij gerechtigd om een aangezochte rechter te vragen om elke inbreuk makende handeling die afdoet aan de rechtsgevolgen van een buitenlands vonnis te beletten. Indien de rechtsgevolgen van een buitenlands vonnis worden aangetast door bepaalde handelingen, is de partij gerechtigd om de aangezochte rechter te verzoeken om de voorafgaande toestand, de *status quo ante*, te herstellen.

Afgezien van het voorgaande, kan de samenloop van erkenning van buitenlandse vonnissen met bepaalde zeerechtelijke regels en de scheepvaartpraktijk aanleiding geven tot nieuwe variaties op het thema van erkenning van buitenlandse vonnissen en uitbreiding van haar betekenis. Bij voorbeeld in geval van erkenning van buitenlandse aansprakelijkheidsvonnissen door een fondsrechter kan deze acht slaan op de plaatselijke beperkingsregels om te bepalen in hoeverre een buitenlands aansprakelijkheidsvonnis moet worden erkend bij de proportionele verdeling van een fonds tussen de schuldeisers.

In geval van de erkenning van een buitenlandse gerechtelijke verkoop van schepen, ziet erkenning niet enkel op erkenning door de aangezochte rechter, maar ook door bestuurlijke organen, te weten het scheepsregister in het kader van de doorhaling en hernieuwde teboekstelling van schepen, om te waarborgen dat de koper op de gerechtelijke veiling een onbezwaarde titel tot het schip kan verkrijgen.

Vanuit procedureel oogpunt biedt Brussel Ibis de eenvoudigste rechtsgang voor de erkenning van buitenlandse vonnissen, ongeacht of de vonnissen ten uitvoer gelegd dienen te worden of niet. Naar Engels recht, bestaan er in hoofdzaak twee procedures voor de erkenning van buitenlandse vonnissen, te weten het instellen van een rechtsvordering of door registratie. Hoewel de registratieprocedure eveneens eenvoudig is, is deze alleen toepasselijk op buitenlandse vonnissen die binnen de reikwijdte vallen van de wet van 1920 of de wet van 1933 en krachtens welke betaling van een geldsom dient te worden tenuitvoergelegd. Naar Amerikaans recht geschiedt erkenning van buitenlandse vonnissen in het algemeen doordat de schuldeiser onder het vonnis (*judgment creditor*) een afzonderlijke rechtsvordering instelt. Indien het doel van de erkenning van buitenlandse vonnissen is om deze ten uitvoer te leggen, verlangt Amerikaans recht dat de rechter bij wie de rechtsvordering is ingesteld ofwel persoonlijke jurisdictie had over de verweerder, danwel dat vermogensbestanddelen van de debiteur onder het vonnis (*judgment debtor*) zich binnen de jurisdictie bevinden. In tegenstelling hiermee, stelt het Engelse recht dergelijke bevoegdheidsvereisten niet.

Ten aanzien van de rechtsgang voor erkenning en tenuitvoerlegging van buitenlandse zeerechtelijke vonnissen, bestaan er in common law jurisdicties enkele bijzonderheden. Aangezien beide gekozen common law landen bijzondere admiraliteitsprocedures kennen, d.w.z. naar Engels en Amerikaans recht de in rem procedure (*in rem action*) en naar Amerikaans recht de 'Rule B attachment', kan de schuldeiser onder een vonnis een bijzondere admiraliteitsprocedure inroepen om een buitenlands vonnis ten uitvoer te leggen mits aan de vereisten voor deze procedures is voldaan. De bijzondere admiraliteitsprocedures in de beide landen zijn beiden gemakkelijk toegankelijk en kunnen bovendien onmiddellijk een financiële last opleggen op de vermogensbestanddelen van de debiteur van het vonnis. Hierdoor vormen zij een aanvullende mogelijkheid voor de schuldeiser van een zeerechtelijk buitenlands vonnis om grensoverschrijdende tenuitvoerlegging van het vonnis te bewerkstelligen. De beide bijzondere procedures hebben echter een beperkte reikwijdte. Vergeleken met zijn Amerikaanse tegenhanger brengt de Engelse admiralty rechter enkele beperkingen aan op de toepasselijkheid van de in rem procedure om buitenlandse zeerechtelijke vordering ten uitvoer te leggen.

Curriculum Vitae

Yuhan Ji obtained her bachelor's degree in 2010 and completed the master programme on Maritime Law in Dalian Maritime University in 2012. Since September of 2013, Yuhan has been a PhD candidate in the School of Law, Erasmus University Rotterdam, supervised by Prof. dr. Frank Smeele. In November and December of 2014, Yuhan conducted part of her research at the Max Planck Institute for Comparative and International Private Law in Hamburg, Germany. Yuhan has been a Judge Assistant in the Maritime Tribunal of the Nanjing Maritime Court of PRC since June of 2021.

PhD Portfolio

Erasmus University Rotterdam - PhD Portfolio

Description	Organizer	EC
Required		
EGSL - Reflection on Social Science Research (2014)		5.00
EGSL - Research Lab (2014)		10.00
EGSL - Review Day (2014)		0.00
EGSL - Writing Clinic (2014)		5.00
EGSL - Academic Writing in English (2014)		5.00
EGSL - Introduction to Legal Methods (2014)		5.00
EGSL - Collaborating with your Supervisor (2014)		0.00
Total EC		------ + **30.00**

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Yuhan Ji
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