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HARMONISATION IN THE RULES ON THE RECOGNITION OF FOREIGN JUDICIAL SHIP SALES

by

YINGFENG SHAO



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Harmonisation in the Rules Governing the Recognition
of Foreign Judicial Ship Sales

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Harmonisation in the Rules on the Recognition of Foreign Judicial Ship Sales

Yingfeng Shao
China

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fulfilment of the requirements for the award of the degree of
Doctor of Philosophy in Maritime Affairs

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Abstract

Ships, the high-value asset used in both seagoing and inland navigation, and in which various legal and natural persons have interests, must be secured against legal risks arising from any cross-border legal divergence. Legal certainty of ownership of the ship is therefore desirable but it is under challenge with regard to the judicial sale of a ship: the effects of a judicial sale may be denied in a jurisdiction other than the place where it was sold under the principles of state jurisdiction.

Multiple efforts have been made to address legal uncertainty. Particularly important is a new treaty governing the international effects of judicial sales: the United Nations Convention on the International Effects of Judicial Sales of Ships (Beijing Convention). This dissertation is intended to contribute to that process by setting out two tasks; first, it seeks to identify the obstacles to the recognition of foreign judicial sales, providing additional knowledge which may aid national legal orders when deciding recognition approaches; second, it looks for a universal solution that better guarantees recognition which would benefit shipping.

A comparative legal research exercise exploring similarities and dissimilarities in the municipal and international laws governing the recognition and sale procedures is undertaken. Research results are presented in this kappa and research papers, exhibiting the profuse difficulties a party seeking recognition may encounter in the current legal framework, and explains the new recognition approach under the Beijing Convention. Based on the research findings, a universal solution is proposed that avoids *révision au fond*, defines the finality of a judicial sale, and sets forth a fixed number of grounds for denial of recognition which may bring greater certainty. This purported optimal solution should guarantee equal treatment for all foreign sales seeking recognition before the registry while minimising the registrar's burden of finding and examining foreign laws. In the interest of universality, this solution better accommodates disagreeing principles underlying certain aspects of the sale, *viz.*, the ship's location at the time of sale, the notification of sale, and the variance in the standard sale, namely, court-approved private sales, in a manner that more states may accept. This solution is largely in line with the recognition approach under the Beijing Convention. Considering the greater legal certainty the new instrument may bring, ratification is supported.

Keywords: Foreign judicial ship sales; recognition; applicable law; Beijing Convention

Abbreviations

Arrest Convention 1999	International Convention on Arrest of Ships, 1999
Beijing Convention	United Nations Convention on the International Effects of Judicial Sales of Ships
CMI	Comité Maritime International
Chinese Choice of Law	Law on Choice of Law for Foreign-Related Civil Relationships of the People's Republic of China
IMO	International Maritime Organisation
Judgments Convention	Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters
MLM Convention 1926	International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages
MLM Convention 1967	International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages
MLM Convention 1993	Geneva Convention on Maritime Liens and Mortgages, 1993
Service Convention	Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

List of papers included in this dissertation

Paper 1:

Yingfeng Shao and Laura Carballo Piñeiro, 'Towards a Harmonised Approach to the Recognition of Foreign Judicial Sales of Ships Through Conventions Addressing Maritime Liens and Mortgages' (2021) *Il Diritto Marittimo* 736.

Paper 2:

Yingfeng Shao, Laura Carballo Piñeiro and Maximo Q. Mejia. Jr., 'Recognition of Foreign Judicial Sales of Ships and Private International Law' (2022) 3 *JIML* 166.

Paper 3:

Yingfeng Shao, Laura Carballo Piñeiro and Maximo Q. Mejia. Jr., 'Paving the Way to Recognising Foreign Judicial Sales of Ships: A Comparative Analysis of Judicial Sale Proceedings in Selected Jurisdictions' (2023) 15 *Cuadernos de Derecho Transnacional* 136.

Paper 4:

Yingfeng Shao, Laura Carballo Piñeiro and Maximo Q. Mejia. Jr., 'A Newcomer to Maritime Law: The Beijing Convention on the International Effects of Judicial Sales of Ships' (manuscript for submission to a peer-reviewed academic journal).

1. Introduction

1.1. Background and rationale for research

Shipping goes hand in hand with the world economy, susceptible to changes in trade activities.¹ With the substantial growth of international trade in goods and services,² vessels frequently sail in and out of the territorial seas of different countries, transporting goods from one end of the world to the other. In this transportation process, shipowners may fail to meet their financial obligations to various creditors, causing their ships to be arrested in the states in which ships call and then sold to pay off debts.

At the outset, it is to be noted that in the present dissertation, the laws of four jurisdictions have been selected for analytical treatment albeit not entirely without justification. China is, in holistic terms, arguably the biggest shipping nation in the world and the country from where the writer hails. English law has largely shaped modern maritime law internationally. Dutch law is a prominent civil law jurisdiction in the shipping world³ and Malta,⁴ chosen somewhat randomly as an open registry state has played a significant role together with China, to instigate the adoption of the Beijing Convention, the goal of which is to harmonise national rules governing recognition of foreign judicial sales of ships, the very theme of this doctoral research effort.

In general, a judicial sale has two correlated outcomes. First, charges of whatsoever nature on the ship cease to attach to that ship and pass onto the proceeds; second,

¹ Martin Stopford, *Maritime Economics* (3rd ed, Routledge 2009) 3-45.

² Jürgen Basedow, *The Law of Open Societies - Private Ordering and Public Regulation in the Conflict of Laws* (Brill/Nijhoff 2015) 68

³ Till 2022, Rotterdam has still been the biggest container port in Europe, according to UNCTAD (United Nations Conference on Trade and Development) 's statistics. See UNCTAD, *Review of Maritime Transport 2022*, p. 50.

⁴ Till 2022, Malta, with 91967 gross tonnage, is the biggest flag of registration in Europe and ranks 6th in the world, ranked by total tonnage. See UNCTAD, *Review of Maritime Transport 2022*, p. 43.

the successful bidder obtains the ship's ownership free of encumbrances.⁵ With the clean property title that is registered in a competent form, not only can the new owner trade the ship freely without the threat of litigation over ownership, but also will the ship generate greater value in a mortgage as collateral.⁶ As "the eye of the hurricane where it is apparent that the air is undisturbed",⁷ the principle that a judicial sale transfers a clean title valid against everyone has been firmly established in contemporary maritime law.⁸

However, based on the principles of state jurisdiction, the effects of a judicial sale regarding the transfer of ownership may be denied abroad. A national legal order other than the one concluding the sale can, according to the rules governing the effects of foreign judicial sales in its law, refuse to recognise the finality and integrity of the foreign sale.

Two types of public authorities are usually involved in the recognition or denial of the legal validity of foreign judicial sales of ships; namely, ship registries and courts. A ship registry must decide whether to terminate or update the ship registration at the request of the purchaser as the new owner. In that case, the purchaser must substantiate its title to the ship to the satisfaction of the ship registry, following the pertinent registration rules in the state where the ship is registered. As shown by precedence, this process could be problematic for *bona fide* purchasers. In *The Norsland*,⁹ a Canadian court found that after it disposed of a Panamanian-flagged ship by judicial sale, the purchaser faced problems deregistering the ship from Panama. The Panamanian registry required the purchaser to pay the tax arrears to the Panamanian Government; otherwise, it would not delete the ship from the Panamanian register. After paying those tax arrears, the purchaser petitioned for

⁵ Notably, some jurisdictions, such as German law, allow qualified judicial sales, which means that some charges will continue to attach to a ship after a judicial sale of that ship. Also, the Geneva Convention on Maritime Liens and Mortgages, 1993 (2276 UNTS 39), Article 12 permits such qualified sales.

⁶ The United Nations Commission on International Trade Law (UNCITRAL), *Cross-border Issues Related to the Judicial Sale of Ships: Proposal for Possible Future Work Received from the Comité Maritime International (CMI)*, A/CN.9/923, para 5.

⁷ Grant Gilmore and Jr. Charles L. Black, *The Law of Admiralty* (Foundation Press 1975) 787.

⁸ For common law, see W. Wylie Spicer, 'Court-Ordered Sale of Vessels' (1979-1980) 11 *J. Mar. L. & Com.* 239; Paul Myburgh, "'Satisfactory for its Own Purposes': Private Direct Arrangements and Judicial Vessel Sales' (2016) 22 *J.I.M.L.* 355. For civil law, see Jan Erik Pötschke, 'Judicial Sale of Ships in Germany as an Example for a Civil Law concept' in the Comité Maritime International (CMI), *Yearbook 2013*, 143-150; Giorgio Berlingieri, 'Italy Part III. Judicial Sales of Vessels and Priority of Claims' in Christian Breitzke and Jonathan Lux (eds.), *Maritime Law Handbook* (Kluwer Law International BV 2019). For Chinese law, Mark Sachs and Yafeng Sun, 'China Part III. Judicial Sales of Vessels and Priority of Claims' in Christian Breitzke and Jonathan Lux (eds.), *Maritime Law Handbook* (Kluwer Law International BV 2019).

⁹ (1972) Carswell Nat 18, FC 430.

subrogation of rights in its favour for the sum paid. In supporting the application of the purchaser, the Canadian court averred as follows:

[t]he refusal to comply with a judgment of this court after filing a claim, in addition to being an affront to a Canadian court, represents a refusal by that country to abide by the decisions of a court in another country, and an exception to a rule honored by every nation in the world. Indeed, if other countries, or other debtors, decided to follow this bad example, it would create confusion in an area which can be effectively controlled only with the good faith of all seafaring nations.”¹⁰

Courts must decide the validity and effects of a foreign judicial sale according to their own private international law dictates,¹¹ in an action for wrongful interference against a person who denies the shipowner’s title, or when facing a person seeking a declaration as to its ownership of the ship. In deciding such, the foreign sale may be considered ineffective in that state. For instance, in an action where the ship is arrested for a claim pre-existing the foreign judicial sale, the court seised may support the arrestor, holding that the right in question is still in force, even after the judicial sale. The Maltese case involving the *MV Bright Star* illustrates this possibility. In October 2016, a Maltese-flagged ship was arrested in Jamaica and later sold by the local court. Even though the Jamaican court reserved 3 million US dollars for the sole reason of satisfying a Maltese mortgagee and the ship was already registered in Liberia by the successful bidder, when the ship entered Maltese waters in June 2018, the Maltese mortgagee applied for the arrest of the ship before a Maltese court. In deciding on the arrest case, the Maltese court supported the mortgagee, refusing to recognise the Jamaican sale for reason that the Maltese mortgage was not given the same privilege as provided for under Maltese law.¹² Arguably, variables in maritime rights motivate creditors to challenge judicial sales in foreign legal systems; divergent national recognition regimes for those sales make such challenges viable.

Indeed, legal uncertainty as regards judicial sales is a problem in practice. Besides the two cases mentioned above, according to the Comité Maritime International (CMI) list, cases disputing the effects of foreign judicial sales were adjudicated in diverse jurisdictions, including England, Canada, South Africa, Netherlands, China,

¹⁰ *ibid.*

¹¹ Note that courts from some legal systems do not have private international law rules such as jurisdiction, conflict or recognition rules. Facing a case involving foreign elements, they tend to apply a unilateralist approach; they either apply their own law or not.

¹² Jean Pie Gauci-Maistre and others, ‘Malta Overrides Foreign Auction’ *The Arrest News* (April 2019); McPherse Thompson, ‘Ship Auctioned in Jamaica Rearrested in Malta’ *The Gleaner* (22 February 2019).

the USA, Ireland, Singapore, and France.¹³ Needless to say, litigation is the dispute resolution of last resort; thus, the actual number of disputes and hence the types of creditors involved might be much more than reported. Inspired by these reported and unreported precedents, creditors in similar positions may continue to challenge the effectiveness of a completed judicial sale in their preferred forum.

Legal uncertainty of judicial sales is hazardous to the general well-being of international maritime trade, as it affects worldwide business interests in shipping industries. As a starter, *bona fide* purchasers may incur unjustified costs for closing the previous registration. Even worse, they may be compelled to participate in lengthy proceedings initiated by unscrupulous former creditors who wish to maintain their claims which the sale should have already purged.¹⁴ Concomitantly, seafarers may endure hardship during the long litigation. Crew members may languish in the port of the state where the case is tried unable to leave the ship and supported by minimal provisions and fuel to proceed further.¹⁵ Besides, ship financiers for purchasers, concerned with a devaluation of the asset resulting from the nuisance by previous creditors, would undertake amicable measures to circumvent such risks, thus incurring extra work and expenditure.¹⁶ Apart from individuals, the ability of public authorities to provide facilities and amenities might also be impaired. For instance, abandoned ships lying in ports could wreak undue havoc.¹⁷ On the other side, without the prospect that a judicial sale will vest a valid title, potential bidders in those sales may refrain from offering a high price.¹⁸ Thus the proceeds to be distributed may be decreased to the detriment of all parties involved. Significantly, creditors with lower rank in the proceeds distribution and the relatively small margin they operate with,¹⁹ such as service providers, would be

¹³ CMI, *List of Case Summaries* <<https://comitemaritime.org/work/judicial-sale-of-ships>> accessed 29 July 2021.

¹⁴ *The Phoenix* [2014] 1 Lloyd's Rep 449 (St Vincent and the Grenadines, Eastern Caribbean Supreme Court). In that case, the person who bought the ship from the purchaser of a North Korean judicial sale could not deregister the said ship from its previous registry, the registry of St Vincent and the Grenadines. Later the ship was sold on to another party, who claimed a declaration that it was the lawful owner of the ship free from encumbrances, as well as an order compelling the registrar to deregister the ship from the register of St Vincent and the Grenadines. The Eastern Caribbean Supreme Court supported the new shipowner. The judicial proceedings compromised two trials by the first instance and appeal courts and took 5 years to finalise.

¹⁵ UNCITRAL, *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, 4. Hereinafter referred to as Proposal from Switzerland.

¹⁶ *ibid*, 3.

¹⁷ *ibid*, 4.

¹⁸ Myburgh (n 8).

¹⁹ Proposal from Switzerland, 4.

harmed. In short, the guaranteed international effects of judicial sales are instrumental in obtaining a fair sale price, the free flow of maritime traffic and the continuation of uninterrupted international trade; their importance is beyond doubt.

Considering the number of judicial sales in the pragmatic world, if legal certainty in judicial sales can be enhanced, multitudinous parties involved in thousands of judicial sales may be aided. As acknowledged by the Admiralty Court of England and Wales, there were 17 warrants for arrest issued and 11 vessels sold by the court from 2020 to 2021. The number of arrests is normal, given that notification of an intended arrest usually leads to the provision of a P&I letter of undertaking. However, the number of sales is unusually high, which is in part because of the economic impact brought by the pandemic.²⁰ In four East Asian countries, namely, Korea, China, Singapore and Japan, between 2010 and 2014, over 480 vessels were sold by the procedure of judicial sale each year.²¹ Furthermore, the latest data shows that in China, from 2015-2018, 784 ships were sold, of which 33 were foreign-flagged; from 2018-2021, 1252 ships were sold, of which 30 were foreign-flagged.²² Considering the continual development of world trade and the continual repercussions of the pandemic for the shipping industry, it seems reasonable to infer that, like China, the number of judicial sales in other countries should also have increased during the past years. Furthermore, on a world basis, the number of judicial sales would continue to increase in the future.

In view of the challenge, efforts were made to enhance legal certainty in judicial sales in the multijurisdictional community. However, the previous attempts, which mainly focus on unifying maritime liens and mortgages, have not paid off.²³ Recently, a new convention has been adopted to deal with the international effects of judicial sales. Under the auspices of the United Nations Commission on International Trade Law (UNCITRAL), a treaty, referred to as the Beijing Convention, was concluded in July 2022,²⁴ and, later in the same year, adopted by

²⁰ During the said period, the insolvency of the cruise industry during the pandemic caused six cruise vessels to be arrested and five out of them to be sold. The Judiciary of England and Wales, *The Commercial Court Report 2020-2021 (Including the Admiralty Court Report)*, 18.

²¹ Stuart Hetherington, 'The Malta Colloquium on Recognition of Judicial Sale of Ships: Valletta, 27 February 2018' < <https://comitemaritime.org/wp-content/uploads/2018/05/Hetherington-presentation-at-Colloquium-on-Recognition-of-Judicial-Sale-of-Ships-Valletta-Malta-270218-003.pdf> > accessed 29 March 2021.

²² This data comes from the presentation by the Chinese judge Hou Wei, in the Symposium on the Development of Ocean Rule of Law of China, held by the Dalian Maritime University, on 19 November 2022.

²³ A discussion on these previous attempts is made in Paper 1.

²⁴ United Nations General Assembly, 'Report of the United Nations Commission on International Trade Law', A/77/17, paras 99. This report covers the fifty-fifth session of the UNCITRAL

the General Assembly of the United Nations.²⁵ Whether this new instrument is sufficient for recognition of foreign judicial sales remains to be seen.

This PhD research aims to contribute to the study on how to guarantee the international effects of judicial sales, *i.e.*, safeguard the validity of the purchaser's title irrespective of where the ship goes. To this end, two research objectives are formulated. First, this dissertation exposes impediments to the recognition of foreign judicial ship sales; thus, additional knowledge, which may benefit national legal systems when making decisions with regard to the treatment of foreign judicial sales, can be provided. Second, it aims to propose a consistent approach that better safeguards recognition, in the interest of the general well-being of international maritime trade. This research will investigate the national and international regimes under which the effects of a foreign judicial sale are decided. The previous international attempts to address uncertainty in the title, the national mechanisms for recognition of foreign judicial sales in selected countries, and the recognition approach in the Beijing Convention, are perused.

1.2. Research questions

This dissertation focuses on the rules governing the validity and effects of foreign judicial sale and delves into the pertinent international instruments and national legal systems rooted in divergent legal traditions, including common law, civil law, mixed jurisdictions, and the laws of East Asian jurisdictions on a selective basis.²⁶ The following research questions are addressed which correspond to the objectives highlighted above:

- What is the existing international regime for recognition of foreign judicial sales?
- How do selected jurisdictions validate foreign judicial sales?
- How do selected jurisdictions carry out judicial sales?
- Why the Beijing Convention is able or unable to bridge the gap between the desired legal certainty and the lack of recognition of foreign judicial sales?

Commission, held in New York in 2022, and it was submitted to the 77th General Assembly for comments. Hereinafter referred to as Report of UNCITRAL 2022.

²⁵ Details of the adoption of the Beijing Convention by the General Assembly can be found on the UN website: <<https://www.un.org/en/ga/sixth/77/summaries.shtml#34mtg>> accessed 4 February 2023.

²⁶ Rene David and John EC Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (Stevens & Sons 1985).

Chapter 2 of this dissertation explains some of the critical nomenclature that have laid the foundation of and informed this study. Following that, Chapter 3 expounds on the research methodologies applied. Chapter 4 provides insights into how the research objectives are achieved, drawing upon the findings of the research papers dedicated to this analysis. The dissertation then concludes with a summary in Chapter 5. Four research papers have been written to answer the research questions raised one after another. With the co-authors' consent, the writer of the dissertation purports to reiterate in the dissertation certain statements or views expressed in the research papers by making explicit references to them for the sake of clarity.

1.3. Scope and delimitations

In this dissertation, the legal rules under which foreign judicial sales of ships are given effect in certain jurisdictions are investigated. It explores maritime rights to the extent that their satisfaction forms an integral part of the sale procedure. The rules of conflict of laws concerning maritime rights and the substantive laws governing maritime claims are not addressed. As well, forced sales following the seizure or confiscation by a public authority, *i.e.*, where the sale price contributes to the national revenue, fall outside the scope of the dissertation.

2. Concepts

2.1. Judicial sales of ships

Notwithstanding the lack of an explicit definition of judicial sales across national legal orders, the legal concept of judicial sales is accepted worldwide.²⁷ As an enforcement measure, the judicial sale of a ship realises the value of the defendant's asset to satisfy a claim in relation to the ship or shipowner. It is not an interim remedy, such as ship arrest, as defined under the International Convention on Arrest of Ships, 1999 (Arrest Convention 1999)²⁸ but a remedy determinative of substantive issues.²⁹

In order to achieve equilibrium on the one side, keeping the consumption of time and money as low as possible and on the other side, protecting the rights of whoever may be affected by the procedure, each jurisdiction develops its sale procedural rules.³⁰ That said, despite the divergent national rules, a sale usually consists of similar procedural stages in one legal system as in another. These procedural stages, in chronological order, are as follows: the initiation of a sale, the preparation of the sale, the sale itself, and the payout after the sale. Different matters are dealt with in each stage.

Three prerequisites must be met for initiating the sale of a ship: (i) an asset constitutes a ship for enforcement purposes; (ii) a qualified person commences a sale before a competent authority; (iii) and the ship is arrested before the sale.

²⁷ Aurelio Fernandez-Concheso, 'Presentation on The First Set of Questions' in CMI, *YearBook 2010*, 207-212, 209. As shown in this report, no definition of judicial sales exists in the legal systems of the following 23 states: Argentina, Australia, Belgium, Brazil, Canada, China, Croatia, Denmark, Dominican Republic, France, Germany, Italy, Japan, Malta, Nigeria, Norway, Singapore, Slovenia, South Africa, Spain, Sweden, United States of America, Venezuela.

²⁸ 2787 UNTS 3, Article 2 (1).

²⁹ David. C. Jackson, *Enforcement of Maritime Claims* (Informa Law from Routledge 2005) ch 25.

³⁰ Benoit Goemans, 'Report on the Key Procedural Elements of Judicial Sales of Ships' in CMI, *YearBook 2010*, 212-220, 212.

Generally, it can be said that a vessel defined in the COLREGS as “any watercraft ... used or capable of being used as a means of transportation on water”³¹ for discharging people or cargoes at the destination constitutes a ship susceptible to judicial sale, except for those used in public service and thus granted immunity from arrest or judicial sale.³² The standing to initiate a sale and the authority competent to order sales differ from state to state. In common law countries, as represented by English law, creditors are allowed to petition a sale pending judgment in an action *in rem*, which is against the ship and under a specific jurisdiction for maritime claims.³³ In other countries, typically under continental European legislation, the applicant for sale must obtain an enforceable title. Noteworthy, jurisdictions in which sales *pendente lite* are available are not necessarily more advantageous than those prohibiting them, to the extent that a sale pending action is subject to a critical review. Such may be ordered only when a purportedly valid claim is not defended, the debtor is in financial hardship, and the ship’s value keeps decreasing during the period of arrest. In principle, a sale is preceded by an arrest of the ship concerned, and the term arrest refers to the physical detention of the ship,³⁴ effected by means of a warrant of arrest, which is to be executed by a court officer, such as a bailiff or marshal.³⁵

The competent authority for the ship sale must make some preparations. Among them, three are generally used across jurisdictions: service of the relevant documents, appraisal of the ship’s value, and notification of the upcoming sale to interested parties.

Documents related to the sale – usually the arrest warrant, the sale application and the sale order, must be served on the shipowner, the debtor if different from the shipowner, and the prescribed parties with interests in the ship. As for appraisal, it can be mandatory³⁶ or optional,³⁷ depending on the legal system carrying out the

³¹ Rule 3 (a) of International Convention for Preventing Collisions at Sea, 1972, 1050 UNTS 16, UKTS 77 (1977), Cmnd. 6962.

³² The immunity of ships from arrest and sale is governed by both national law and international treaties. See the International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels, signed at Brussels, April 10th 1926, and Additional Protocol, signed at Brussels, May 24, 1934 (176 LNTS 199), provides a proper illustration.

³³ Action *in rem* also exists in mixed jurisdictions that have modelled their maritime law on common law, such as Maltese law.

³⁴ Some jurisdictions allow arrest by means of non-physical detention, which means that the ship can be put in arrest without being physically detained. Dutch law provides an example. See Section I.1.C of Paper 3.

³⁵ See Section II.1 of Paper 3. In Anglo-Canadian law, once an arrest warrant is served by the court, the ship is under arrest.

³⁶ Such as English and Chinese laws.

³⁷ Such as Dutch and Maltese laws.

sale. Further, in the states where an appraisal is necessary, some require the appraised value to be confidential,³⁸ while others announce the appraised value together with the sale conditions to the public.³⁹ The sale will be notified to parties interested by two means: advertisement to the public and notification to prescribed parties. Whereas the information in such an advertisement in national laws is similar, the persons entitled to a sale notice vary considerably. Of particular importance, unlike civil law countries where known creditors, such as registered mortgagees, will be given a sale notice, most countries which are members of the Commonwealth of Nations consider ship arrest as constructive notice to the world and thus make those creditors responsible for keeping themselves informed of what happens to the ship.⁴⁰ One way or another, in the preparation stage, the sale information is made available to potential bidders, and interested persons are alerted of the upcoming sale and thus given a chance to intervene in the sale proceeding accordingly. If any party wants to halt the sale, now is the right moment to take action.⁴¹ It is impossible to do so later after the sale becomes final, as a sale with finality is not subject to appeal.⁴²

Then, the actual sale takes place. A standard sale procedure is a public auction, but where applicable, a court-approved private sale producing the same effects is also viable.

As for a public auction, conflicting methods in national laws are employed to achieve the best possible price. For instance, a Dutch sale uses a two-part auction process consisting of bidding and decreasing; namely, in the first part bidders offer increasingly higher bids, but in the second part the judge or notary sets a price higher than the highest bid in the first bid and then gradually decreases the price until a bidder says “mine”.⁴³ In contrast, a Chinese sale makes the assets’ appraised value available to the public, relying on judicial transparency to acquire a higher price.⁴⁴ Regarding court-approved private sales, they can displace a public tender process only if certain conditions are met to the court’s satisfaction. Some legal systems, such as English law, have relatively restrictive conditions, compared to others, for

³⁸ Such as a judicial sale in English law.

³⁹ Such as an online judicial ship sale in Chinese law.

⁴⁰ The above-mentioned national sale procedures are discussed in Section II.2 of Paper 3.

⁴¹ A sale may also be stopped for various reasons: inappropriate sale conditions, parties’ intention to settle the claim amicably, illegitimacies in the sale proceeding, and valid grounds relevant to the enforceable title, such as the judgment to be enforced was rendered based on factual or legal errors. See Section II.3.C of Paper 3.

⁴² See Section II.3.A of Paper 3.

⁴³ *ibid.*

⁴⁴ See Section II.2.B of Paper 3.

instance, Maltese law.⁴⁵ After a sale, either by means of public tender or through a private sale, is concluded upon sufficient payment by the successful purchaser, all relevant claims cease to attach to the ship and pass on to the proceeds of sale. Thus, the successful bidder obtains a title free of encumbrances and valid against everyone (*erga omnes*). The effects of a judicial sale are similar across jurisdictions. Note that in some legal systems, with the purchaser's consent, certain privileges can be maintained/survive through the sale and continue to attach to the ship. Namely, a qualified sale is permissible.⁴⁶ A judicial document certifying the completed sale will always be issued to the purchaser.⁴⁷

After the conclusion of the sale, the price the purchaser paid will be distributed among the creditors in relation to the ship. Typically, maritime lienees, mortgagees, and service providers. The authority in charge of distribution, which is usually the court that approved⁴⁸ or ordered a sale,⁴⁹ or within whose cognisance the ship was situated at the time of sale, such as under Dutch law, will not make payment out until the order of priorities of the claims competing over the proceeds is determined under its law. The liquidation process varies significantly between countries.⁵⁰ While some states deem it necessary to call upon creditors to file their claims and remind those creditors to protect their respective interests,⁵¹ others expect creditors to keep themselves informed of the ship's status, including the distribution matters.⁵² In the latter states, a potential claimant who has not entered a caveat may become known of the matters too late, *i.e.*, after all money deposited in the court has been paid out.⁵³

In conclusion, a judicial sale becomes final once concluded, regardless of whether the distribution process is completed. After the conclusion, previous creditors, who have been given due access to the sale proceeding, can no longer pursue the ship, irrespective of whether they are sufficiently satisfied by the proceeds at the payout

⁴⁵ A comparison between these two legal systems can be found in Section II.3.B of Paper 3.

⁴⁶ Such as members to the Geneva Convention on Maritime Liens and Mortgages, 1993 (2276 UNTS 39). Article 12 allows certain charges to attach to the ship after a judicial sale.

⁴⁷ See Section II.3.A of Paper 3.

⁴⁸ In the context of a court-approved private sale.

⁴⁹ In the context of a forced sale with judicial intervention.

⁵⁰ See Section II.4 of Paper 3.

⁵¹ Such as Chinese (by means of advertisement and notification of the upcoming liquidation) and Dutch (by means of notification of the distribution proceeding) laws.

⁵² Such as English law. Details of the liquidation process in a Chinese or English sale can be found in Section II.4 of Paper 3.

⁵³ *ibid.*

stage.⁵⁴ Meanwhile, the purchaser obtains a title operating *erga omnes*. It must be noted, however, that legal systems differ greatly with regard to the issues of maritime rights and their scope and ranking,⁵⁵ leading to legal risks for secured parties undertaking maritime ventures, which are by nature international. Hence whether a creditor can be sufficiently satisfied is partly subject to which legal system carries out the sale. This may lead to unsatisfied creditors challenging a completed sale in their preferred forum. Section 2.2 below will explain the primary methods in private international law to deal with such challenges, *i.e.*, how to decide the validity and effects of foreign judicial sales.

2.2. Recognition of foreign judicial sales

The point of departure of private international law is the coexistence of several legal orders, which pursuant to the principle of sovereign equality, are on the same footing. Given this, private international law faces the task of coordinating diverse legal systems. In principle, two methods may be applied to perform the coordination task: (i) determining the applicable law to a relation or situation, and (ii) courts recognising relations or situations perfected in another country.⁵⁶

Recognition requires courts to accept the effects of a legal situation or relation finalised abroad.⁵⁷ As argued by some authors, recognition refers to the extension

⁵⁴ In English law, as well as the laws of common law states, the competence of a specific court operating under admiralty jurisdiction to dispose of a *res* by sale (judgments *in rem*) is different from the competence of a common law court to decide the parties' rights (judgments *in personam*). In the former case, the court adjudicates the disposition of property as against the world, and the outcome of a sale as a form of such disposition must be the conferral of a clean title and the purge of pre-existing claims. Due to this nature, it is undoubted that the effects of a completed sale are not subject to distribution processes, especially whether a creditor has been adequately satisfied out of the proceeds. The latest English case defining judgments *in rem* is *Patni v Ali & Anor* [2006] UKPC 51, [2007] 2 AC 85. In Maltese and Chinese laws, explicit rules to similar effects can be found in statutes: the Maltese Merchant Shipping Act, s 37D; the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Laws to the Arrest and Auction of Ships (Fa Shi [2015] 6), aa 16-18.

⁵⁵ Jose Maria Alcantara, 'A Short Primer on the International Convention on Maritime Liens and Mortgages, 1993' (1996) 27(2) J.Mar.L.&Com. 219.

⁵⁶ Jürgen Basedow, 'Private international law, methods of', *Encyclopedia of Private International Law* (2017) 1401-1407, 1402.

⁵⁷ The effects attached to the foreign legal situation or relation in the original state may be adjusted by the court seised in the recognition state, according to the latter's law. Nevertheless, there is usually no doubt about the preclusive effects, such as enforceability or *res judicata* effect when the title of recognition is a judgment. See Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law ECPIL Commentary Volume I Brussels Ibis Regulation 2016* (Verlag Dr. Otto Schmidt KG 2016) 815-817.

of effects from the crystallisation of foreign law to the domestic legal system.⁵⁸ According to others, recognition means treating the crystallisation of foreign law as if it were a domestic one. Some propose a combination of these two mechanisms that the effects crystallised under foreign law would not be received unless they are also known in the legal system of the recognising state.⁵⁹ The term “crystallization” is confined to legal situations or relations established through a certain type of “law-oriented proceeding” before a foreign court or public authority.⁶⁰ Typically, a judicial decision, or an official act, such as a certificate or registration. Thus, for legal situations perfected solely by private action, either a contract or a will, recognition cannot aid. Instead, the forum should use its choice-of-law rules to identify the applicable law and then, pursuant to the designed law, find out the validity and effects of those legal situations or relations.

This dissertation deals with a particular type of “law-oriented proceeding”, the effects of which are susceptible of being recognised: the judicial ship sale as an enforcement measure. A judicial sale is accompanied by either a judicial decision (a judgment decreeing the conclusion of the sale or a marshal’s bill of sale) or an executive document (a notarial deed). When treating such documents as the title of recognition, the consequences pertaining to a judicial sale concerning a clean title with *erga omnes* effect may be recognised through the national mechanism for the recognition and enforcement of foreign judgments. For example, in English law, foreign judicial sales are recognised as judgments in *rem qua* assignments,⁶¹ whereas those sales are recognised as constitutive judgments in Dutch law.⁶² Alternatively, viewing the conferral title as a legal situation formed abroad and evidenced by public documents, this conferral can also be recognised in a manner similar to the recognition of the validity of marriage celebrated in a foreign state, *i.e.*, a type of recognition bearing substantive effects.⁶³ Such recognition is enshrined in the Beijing Convention, whereunder, upon the production of an authentic certificate, the clean title perfected via a judicial sale under the law of the sale state will be given effect in the requested state, subject to a denial of recognition

⁵⁸ Basedow, *The Law of Open Societies* (n 2) 258-259. Where the effects of a foreign decision are unknown to the legal order of the recognising state, what is meant by recognition is unclear: implementation of alien effects or assimilation of such effects to the forum legal order?

⁵⁹ Tanja Domej, ‘Recognition and enforcement of judgments (civil law)’, *Encyclopedia of Private International Law* (2017) 1471-1480, 1472, 1474.

⁶⁰ Basedow, ‘Private international law, methods of’ (n 56) 1406.

⁶¹ Albert Venn Dicey and others, *Dicey, Morris & Collins on the Conflict of Laws* (15th ed., Sweet and Maxwell 2015) para 14-109.

⁶² See Section 2 of Paper 2.

⁶³ Jurgen Basedow, ‘Vested Rights Theory’, *Encyclopedia of Private International Law* (2017) 1813-1821.

based on public policy exceptions.⁶⁴ One way or another, where a state recognises a foreign sale and thereby accepts its effects perfected in the state of origin, the title transferred via that sale will be deemed valid and operate *erga omnes* in the recognising state. Any parties in further proceedings in the latter state must respect that title.

Despite the availability of recognition, foreign judicial sales are also a case for the application of rules of conflict of laws or ‘private international law’, as it is frequently called in continental civil law jurisdictions. In other words, Namely, the validity and effects of a foreign sale can be determined under the applicable law, which governs property dispositions and is designated per the forum’s conflict rules. Due to the different substantive policies informing judicial sales, the law applicable to check the validity and legal consequences of judicial sales varies from state to state. Some countries want to protect rights acquired by individuals in a mobile world where assets and people frequently move across borders, thus employing the *lex causae* as the applicable law. For instance, in Chinese law, the applicable law can be either the law with the closest and most significant connection (in this case, the *lex situs* may apply)⁶⁵ or the law governing the maritime right that serves as a ground for challenging a judicial sale.⁶⁶ Others consider it necessary to support a specific cohort of individuals, such as mortgagees properly registered, hence applying the *lex fori* for judicial sales. Maltese law provides a good illustration. In Maltese law, for example, the applicable law is Maltese law itself, which grants a high degree of protection to secured creditors with a higher ranking.⁶⁷

It is noteworthy that foreign judicial sales may also be a task for the executive branch of government. Upon the request of the purchaser, a ship registry may re-register the ship in the name of its new owner or delete the registration. Other than compliance with the usual formalities, the registry has to determine whether the foreign sale has sufficiently modified the property relations over the ship. To that end, the registry will also employ the said two methods: conflict rules and recognition. Examples can be found in various states, as presented below.

The deregistration practice of the Liberian registry is an example of the use of conflict rules. Where a Liberian-flagged ship was sold by a foreign court and the ship has been registered in another place after the sale, the Liberian registry will

⁶⁴ See Paper 4.

⁶⁵ The Law on Choice of Law for Foreign-Related Civil Relationships of the People’s Republic of China, Effective 1 April 2011, Article 2.

⁶⁶ (2005) Jin Hai Fa Shang Chu Zi No 401 ((2005)津海法商初字第 401 号) (China, Tianjin Maritime Court).

⁶⁷ The Merchant Shipping Act, s 37D. See the case involving the ship *Bright Star*, case information can be found in Gauci-Maistre et al. (n 12).

recognise the foreign sale and terminate the ship's registration.⁶⁸ However, an analysis of the relevant conflict rules must be undertaken where the ship was sold but not yet transferred to another registry, and amicable settlements between the parties involved cannot be reached.⁶⁹ In such case, the Liberian registry will examine the effects of the foreign sale by virtue of the applicable law for judicial sales as designated by the Liberian conflict of laws rules, namely, the law of the state where the ship is found and sold (the *lex executionis* which is also the *lex situs*).⁷⁰

The reregistration process of the British registry or the Red Ensign Group (REG) of flag states comprising the United Kingdom and its overseas territories aptly illustrates recognising foreign judicial sales. In the foreign sale of a British ship where the purchaser wishes to maintain the British registration, the registrar of a REG flag state may recognise and inscribe the transfer of title in the relevant documentation, provided the prescribed documents evidencing the sale are submitted, including the sale order of a court, appointment of a marshal, and the marshal's bill of sale.⁷¹ That said, sales made by legal systems whose sale procedures do not correspond to English law and thus cannot provide the documents in question may go through a lengthy process to decide whether alternative documents can be accepted. A British registrar, in that case, may require evidence of foreign law to examine the effectiveness of the foreign sale. Indeed, this examination is more in the nature of an analysis of national conflict of laws principles.

For new registration following a judicial sale, a comparison between the Liberian registry, a well-known open registry,⁷² and the Italian registry, a renowned

⁶⁸ The Liberian Maritime Law (Liberian ML), Title 21 of the Liberian Code of Laws of 1956, s.102 (2) (b).

⁶⁹ This statement is based on the presentation by Merle Stilkenbäumer, the managing director of LISCR, in the Colloquium on Judicial Sale of Ships in 2020, who asserted that deregistration following judicial sales required a case-by-case approach to examine whether the registered mortgage was discharged or satisfied. This colloquium was organised by the Ministry of Justice and Administration of the Republic of Croatia and the Croatian Maritime Law Association, and hosted by the Inter-University Centre at Dubrovnik on 7 September 2020. Documents can be found in < <https://iuc.hr/file/1127> > accessed 15 September 2022.

⁷⁰ Liberian ML, s.112 (2).

⁷¹ Simon Hartley, 'England and Wales Part II. Flag and Registration of Vessels and Mortgages in Vessels' in Christian Breitzke and Jonathan Lux (eds.), *Maritime Law Handbook* (Kluwer Law International BV 2019) 15.

⁷² Open registries and traditional maritime registries have different practices in terms of the application of "genuine link". In the present work, the concept as defined in terms of economic links under the 1986 United Nations Convention on Conditions for Registration of Ships (TD/RS/CONF/L.19) is accepted. For a synopsis of the development of this concept, see Richard Coles and Edward Watt, *Ship Registration: Law and Practice* (2nd ed, Informa 2009) ch 2.

traditional maritime registry, shows the divergence in national approaches. The Liberian registry is lenient on the purchaser seeking new registration. Usually, it does not require a deletion certificate issued by the ship's current registry or evidence of the deletion of mortgages. Upon production of public documents evidencing the foreign sale, it is in general ready to grant recognition to foreign sales. Accordingly, a new registration showing the purchaser as the owner will be made.⁷³ In contrast, the Italian registry requires the submission of a closed transcript from the previous foreign registry.⁷⁴ The Italian law thus invokes the *lex registrationis*, in the context of new registration.

In the end, emphasized that as a legal concept, recognition is interpreted in different ways in different contexts as regards substantive law, conflict of laws, *i.e.*, private international law, and public international law.⁷⁵ In this section, "recognition" is construed in terms of private international law as opposed to applicable law. Nevertheless, in the following of this kappa, as well as the four research papers, where applicable, the term recognition is also used in the context of substantive law, *i.e.*, recognising a legal existence regarding the property relations of a ship.

⁷³ Liberian ML, s. 102 (2) (b). See Nancy L. Hengen and George E. Henries, 'Liberia Part II. Flag and Registration of Vessels and Mortgages in Vessels' in Christian Breitzke and Jonathan Lux (eds.), *Maritime Law Handbook* (Kluwer Law International BV 2014) 6-8.

⁷⁴ Giorgio Berlingieri and Andrea Berlingieri, 'Italy Part II. Flag and Registration of Vessels and Mortgages in Vessels' in Christian Breitzke and Jonathan Lux (eds.), *Maritime Law Handbook* (Kluwer Law International BV 2019) 6; Dringa Milito Pagliara, 'Ship Registration in Italy' *Lexology* (30 October 2018) <[Ship registration in Italy - Lexology](#)> accessed 5 September 2022.

⁷⁵ Basedow, *The Law of Open Societies* (n 2) 258.

3. Methodology

3.1. Comparative Legal Research

In the present work the comparative legal research approach in the field of maritime private international law is utilised. The comparative analysis covers maritime law given that the rules of private international law in maritime affairs partly flow from the considerations and aims of maritime law.⁷⁶ A combination of the doctrinal method, *i.e.*, the interpretation of legal rules, and the comparative method, which is a universal method in various disciplines, is used.

Comparative law is “a special legal subject within the broader field of the comparative disciplines which explore the similarities and dissimilarities of different cultural or social phenomena”.⁷⁷ Multiple research purposes may be served by comparative law. On the one hand, as Bell asserts that “comparative law is an instance of the more general form of legal research”, comparative law helps to answer what is the foreign law.⁷⁸ On the other hand, Adams distinguishes the descriptive comparative law, which tells the differences of laws, from the explanatory comparative law, which explains the reasons causing the differences. So that comparative law aids in bringing innovation.⁷⁹ The present work seeks to go beyond a mere description of legal systems into attempting to find an optimal solution for a given problem – the legal uncertainty in the title transferred by a judicial sale.

⁷⁶ Sjur Brækhus, *Choice of Law Problems in International Shipping (Recent Developments)*, Collected Courses of the Hague Academy of International Law, vol 164, 259-260.

⁷⁷ Nils Jansen, ‘Comparative Law and Comparative Knowledge’, in Methias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2008) 306-336, 306.

⁷⁸ John Bell, ‘Legal Research and the Distinctiveness of Comparative Law’, in Mark van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for what Kind of Discipline?* (Oxford: Hart Publishing 2011) 155-175, 175.

⁷⁹ Maurice Adams, ‘Doing What Doesn’t Come Naturally. On the Distinctiveness of Comparative Law’, in Mark van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for what Kind of Discipline?* (Oxford: Hart Publishing 2011) 229-239, 229.

A comparison in law consists of two steps: first, the formulation of a system whereunder similarities and peculiarities from different laws can be compared, and second, proceeding to compare them. It is necessary for performing the first step that the foreign laws are clearly described and understood. In other words, normative studies of what is relevant and vital in the law must be undertaken during the comparison process.⁸⁰ Put in another way, in establishing the conceptual structure for the comparative description of defined laws, the comparative analyst must make a choice of “what matters, that is, which aspects of the law are relevant for the comparative lawyers, and which aspects of the law might benefit from additional knowledge which comparison provides”.⁸¹ This two-step process is repeated in the four research papers and this kappa.

The functional method (functionalism) is employed throughout the research process. Michaels, concerned with the pluralism of the concept of function, suggests, on the one hand, confining the functional approach to the constructive function intended by legislators rather than the latent and actual function of the legal rules as understood by those who are proficient in the sociology of law as a discipline, while construing the functional approach in terms of the concept of functional equivalence (equivalence functionalism).⁸² In other words, if the legal rules in one country can, as envisaged by the legislator, solve the issue addressed by the legal rules in another, the first and second groups of legal rules serve the same function. Following this view in the present work, problems that the legal rules solve are of service in finding comparable rules and building a conceptual structure for comparison. Paper 2 serves to illustrate this point. Two comparisons of convergences and divergences from different laws are made based on two criteria of comparability: the functionality of private international law methods regarding the determination of the effects of foreign judicial sales, and the functionality of each recognition condition concerning the assessment of a particular matter. A conceptual structure for relevant comparative descriptions is formulated accordingly. In specific terms, first, the method employed by a defined state to deal with foreign judicial sales is compared with that used by another; then, the recognition conditions in the legal systems employing the same method are compared.

⁸⁰ Jansen (n 77) 306-310.

⁸¹ *ibid*, 314.

⁸² Ralf Michaels, ‘The Functional Method of Comparative Law’, in Methias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2008) 340-380, 341, 469. Michaels argued that “the functional method” does not exist, because there is no “the functional method” but many functional methods. Functions can mean different concepts and “function” has different functions in a comparative legal study. But there is no better name to describe such a method, so this name remains.

For deciding which law is the closest to the international situation, *i.e.*, evaluation, equivalence functionalism is of limited use, as functionally equivalent legal institutions are by definition of the same value with regard to that function. The criteria of evaluation, therefore, lie outside the function under review; it may be found in its functionality regarding other problems, such as the costs of an institution.⁸³ As alluded to before, this dissertation addresses the problem of legal uncertainty in the title effected via judicial sale in the multijurisdictional maritime society. Thus, in evaluating the research results of a functional comparison, either in the research papers or this kappa, the criterion of evaluation remains legal certainty. The legal regime that does better justice to legal certainty in the context of a judicial sale is superior. Based on the superior law (closest to the international situation), an optimal approach that may better guarantee legal certainty is proposed, in light of similarities between defined legal systems.

Varying national legal systems are examined in different analytical stages, where appropriate. Four legal systems are addressed when exploring the recognition mechanism followed by courts and the national sale procedure: English, Dutch, Chinese and Maltese laws. In this vein, four prevailing legal families, including jurisdictions rooted in the common law, the family of civil law traditions, selected East Asian jurisdictions, and mixed legal systems, are probed, enabling a comprehensive comparative legal study. The categorisation of national legal systems depicted in this dissertation follows that created by Rene David in his book - *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*.⁸⁴

According to Rene David, the Romano-Germanic family of the civil law tradition is founded on codes which are formed by abstract principles regulating all relations in society. The common law family is established by judges who decide cases so that case law jurisprudence serves as its cornerstone. The growth of globalisation accelerates the osmosis of these legal families; thus, nowadays, common law jurisdictions have statutes, while civil law jurisdictions give more weight to cases. Mixed legal systems denote those that have adopted elements from both the civil and common law families. East Asian jurisdictions comprise legal systems exemplified by the system prevailing in China, selected for analytical treatment in this dissertation. China developed its own legal system after deviating from the Soviet legal system, creating its own path as a code law jurisdiction.

When delving into the national registration rules, which exhibit how the executive branch of the government deals with foreign judicial sales, the rules followed by the British, Italian and Liberian registries are examined. In this manner, a far-reaching

⁸³ *ibid*, 373-376.

⁸⁴ David et al. (n 29).

analysis of registration practices is pursued in the context of a foreign judicial sale seeking recognition by a ship registry.

3.2. Research Materials

Materials to be reviewed and researched include the primary and secondary legal sources. The primary legal source consists of national legislation including relevant statutes and regulations and pertinent case law in common law jurisdictions and. In the context of Chinese law, there is the element of judicial interpretations rendered by the Supreme People's Court (SPC) which are binding on lower courts. On the international front there is treaty law including conventions and protocols of sorts, the scope of which may be international or regional. Of particular importance are the old and new conventions concerning the international effects of judicial sales which are compared. These are the International Convention on Maritime Liens and Mortgages, 1993 (MLM Convention 1993),⁸⁵ which is extant, and the United Nations Convention on the International Effects of Judicial Sales of Ships (Beijing Convention),⁸⁶ which has been newly adopted. In addition, to better understand the recognition mechanism under these two instruments, the conventions govern the issues of sale proceedings, such as the judgment underlying a judicial sale, the service of documents in a sale, or the arrest preceding a sale, are examined. These are the Arrest Convention, 1999,⁸⁷ the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Convention),⁸⁸ and the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Judgments Convention).⁸⁹ Other conventions are also addressed as the case is suitable. For example, European legislation is referred to for construing recognition in private international law.

The secondary material includes the *travaux préparatoires* (preparatory documents) of the Beijing Convention, scholarly articles in academic journals, authoritative books, encyclopaedias, conference papers, newspapers, and reports submitted to the sessions held by the UNCITRAL during the deliberations of the Beijing Convention. Notably, the original project on this topic was undertaken by the CMI, who produced an instrument which served as the basis for the work of UNCITRAL,

⁸⁵ 2276 UNTS 39.

⁸⁶ The General Assembly adopted this convention in December 2022. For its text, see Annex 1 of Report of UNCITRAL 2022.

⁸⁷ 2797 UNTS 3.

⁸⁸ 658 UNTS 163, adopted on 15 November 1965.

⁸⁹ Concluded 2 July 2019, not yet in force.

so this instrument and its preparatory documents and conference papers are taken into account, as a supplement to the relevant UNCITRAL documents.

The specific materials studied in each research paper are as follows. The first paper enquires into the MLM Convention 1993 with regard to its mechanism for recognition of foreign judicial sales, and compares this mechanism with its counterparts in the first four versions of the Draft of the Beijing Convention. Various national legal orders, and multiple international and regional instruments, are addressed to clarify legal concepts and requirements contained in the MLM Convention 1993, where applicable. The second paper investigates and compares the national regimes for giving effect to foreign judicial sales in four legal systems: English, Dutch, Chinese and Maltese laws. Both statutes and case law in defined states are explored. The third paper examines the sale proceedings and principles embedded therein in four jurisdictions, which are the same as those in the second paper. Then, drawing upon the prevailing conditions for recognition, as identified in the second paper, the third paper analyses the relevance of the principles underlying the sale procedure to the recognition of sales. The fourth and last paper delves into the recognition approach under the Beijing Convention; studies its relationship with other instruments whereunder recognition may be given, including the MLM Convention 1993 and the Judgments Convention. National registration rules in Italy and Liberia, national sale procedures in China, England and the Netherlands, and treaties concerning certain procedural issues, including, among others, the Arrest Conventions of 1952 and 1999 and the Service Convention, are probed.

4. Findings and Discussion

This dissertation incorporates the kappa and four papers for which I was the leading author. As a whole, it seeks to achieve two research objectives – identifying obstacles to the recognition of foreign judicial sales (Objective 1) and finding an approach that better guarantees recognition (Objective 2), by meticulously answering the research questions (figure 1). In the forthcoming sections, the research findings will be extensively discussed.

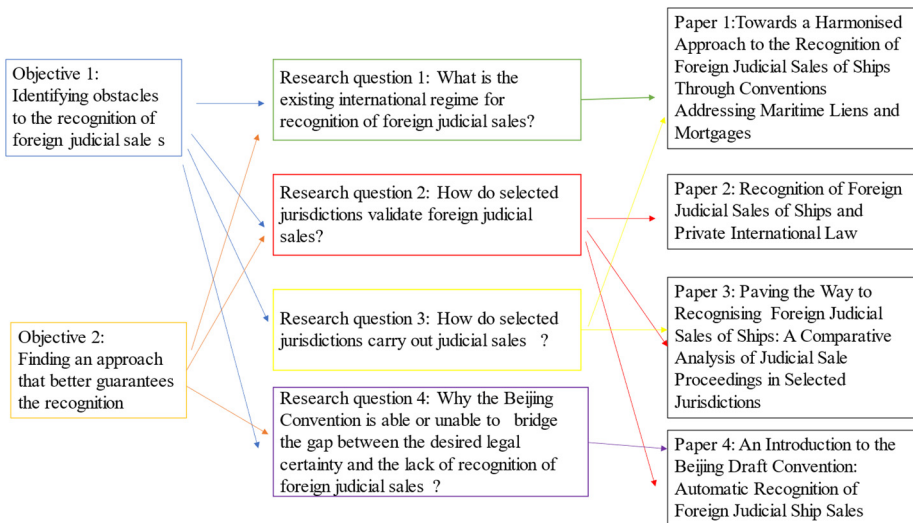


Figure 1: Map of the relationship between the research objectives, questions and papers.

4.1. Research question 1: What is the existing international regime for recognition of foreign judicial sales

The international regime dealing with the effects of judicial sales can be found in the maritime liens and mortgages conventions. Upon the consensus that the value of mortgages would be enhanced through reasonably restricting the number of maritime liens and their validity period, three international conventions, which were intended to facilitate ship financing by uniform rules on maritime securities, came into existence: the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages (MLM Convention 1926)⁹⁰; the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages (MLM Convention 1967)⁹¹; and the MLM Convention 1993. Since the MLM Convention 1967 is not in force, and its rules were further developed in its successor the MLM Convention 1993. It is notable that the MLM Convention 1926 does not address the recognition of foreign judicial sales, this dissertation only addresses the MLM Convention 1993. That convention, acknowledging that a sale at a market price, which might be achieved by the prospect of a sale conferring a title valid against the world, was one of the main features of a satisfactory security,⁹² provides a regime dealing with the international effects of judicial sales.

Before turning to the discussion of the convention recognition regime, three primary matters must be stated. The first is the scope of application of the convention. The MLM Convention 1993 only applies to seagoing ships registered in a state party, and those not registered in the state party but subject to the jurisdiction of a state party, *i.e.*, the ship is lying in that state's territorial seas. Ships owned or operated by a state and used for governmental non-commercial service are excluded from the scope.⁹³ The second concerns the definition of forced sales. Although a definition is lacking, in light of the teleology of the convention, that term, the term forced sale,

⁹⁰ Registration No. 2765.

⁹¹ Adopted on 27 May 1967. This convention has not entered into force and is defunct.

⁹² CMI, *1985 Lisboa I*, p. 46, the original text is as follows:

[T]he essential features of a satisfactory security are: i) the possibility of enforcement wherever the vessel may be found, and to this effect the security must be recognized in as many countries as possible through an international convention; ii) the possibility of sale of the vessel at the market price, and to this effect it is necessary to offer the protective buyer a valid title wherever the ship may go after the forced sale; iii) the possibility of recovering the outstanding portion of the loan from the proceeds of the forced sale, and to this effect the claim of the lender must be granted highest possible priority.

⁹³ MLM Convention 1993, Article 13.

used throughout the convention, can be taken to denote any ship sale that is carried out to satisfy a maritime claim, with public authority intervention, and guaranteeing that if any convention security is involved, it will be satisfied according to the convention rules. The fact that the sale is initiated by a non-convention claim or the sale is not ordered in any civil or commercial proceedings does not matter. Third, probably most importantly, the effects of a forced sale are governed by the convention. A forced sale in the MLM Convention 1993 will effectuate a transfer of title to the purchaser who may assume a registered mortgage or charge⁹⁴ with the consent of its holder.⁹⁵

The strategy of the MLM Convention 1993 to deal with foreign judicial sales is a mixture of a jurisdictional rule that ensures a territorial link between the ship and the sale authority, a conflict of laws rule that refers to the *lex situs*, uniform procedural requirements to be met for effectuating the title in the original state, and a certificate with evidentiary value. These constitutive elements are discussed below consecutively.

In the MLM Convention 1993, the ship to be disposed of by sale must be in the jurisdictional area of the state carrying out the sale, *i.e.*, physically situated within that state's territory, at the time of the sale. The time of the sale is left to the national law to decide.

The law applied for carrying out the sale is the law of the sale state (*lex fori processus*). Except for the matters singled out by the convention,⁹⁶ other matters in relation to a sale proceeding, from the initiation of a sale to its conclusion, are subject to this law. Interestingly, since the sale state is the same as that within whose jurisdiction the ship is at the time of the sale, the applicable law can also be categorised as the *lex situs*.

The procedural requirements for effectuating the title transfer in the sale state include two groups of rules. The first group concerns notice to be sent before a sale, and the second addresses distribution matters. The method⁹⁷ and time frame⁹⁸ to

⁹⁴ Charge covers any property right that can be registered, other than mortgage or *hypotheque*.

⁹⁵ MLM Convention 1993, Article 12 (1).

⁹⁶ Namely, what is a judicial ship sale, the effects of a sale, what public authority has jurisdiction for sale, and the procedural requirements to be met by a sale under the convention (an elaboration on these requirements is made in the main text below).

⁹⁷ MLM Convention 1993, Article 11 (3).

⁹⁸ *ibid*, Article 11 (2). Notice must be given at least 30 days before the sale.

give notice, the person entitled to notice,⁹⁹ and the content of notice¹⁰⁰ are delimited. The publication of the notice in the press is required,¹⁰¹ in addition to the service of notice to individuals. The Service Convention may supplement the MLM Convention for the serving of notice. The MLM Convention 1993 allows its member to use alternative means other than those explicitly provided in its rules. In this vein, the transmission means in the Service Convention can be used under the MLM Convention 1993.¹⁰² As to the distribution of proceeds, the MLM Convention 1993 provides an order of priorities which must be followed in a forced sale. First, the costs incurred for the arrest and sale will be paid off; then, the costs of removal of a ship by the public authority for safety or environmental purposes will rank in the second place; after that, maritime liens, rights of retention, mortgages and charges alike, national maritime liens, and other claims falling outside the convention will be paid out in the said order.¹⁰³ The actual proceeding of distribution, such as the appointment of a liquidator, is still subject to the *lex fori processus*.

After a judicial sale is completed pursuant to the convention rules, a certificate evidencing the sale and its effects will be issued by the public authority competent for issuance in the sale state.¹⁰⁴ Undoubtedly, this certificate has evidentiary value with regard to the transfer of ownership via that judicial sale. However, the MLM Convention 1993 does not standardise the form of the certificate. Nor are any methods with which the authenticity of a particular certificate can be verified provided. Thus, it may be problematic for certificates to be accepted by a foreign legal system.¹⁰⁵

Even worse, the convention fails to pay enough attention to the mechanism to make the sale recognisable abroad. Except for a reference to the registrar, which says that upon production of a certificate, the registrar shall delete the ship registration or register the ship in the name of the purchaser,¹⁰⁶ there are no provisions in the convention with regard to the recognition of foreign judicial sales. Particularly important, the conditions to be examined for recognising the validity of the title by the court or other authority seised of recognition issues are not clarified. Rather,

⁹⁹ *ibid*, Article 11 (1). Including the ship registry, the registered ship owner, the holders of registered securities, and the maritime lienors known to the authority for the sale.

¹⁰⁰ *ibid*, Article 11 (2). The notice content must be sufficient to provide interested persons information with which they can protect themselves in time.

¹⁰¹ *ibid*, Article 11 (3).

¹⁰² *ibid*, Article 11 (3). See Section 3.4.1 of Paper 1.

¹⁰³ *ibid*, Articles 12 (2)-(4).

¹⁰⁴ *ibid*, Article 12 (5).

¹⁰⁵ See Section 3.6 of Paper 1.

¹⁰⁶ MLM Convention 1993, Article 12 (5).

those conditions are deferred to the national law. In this sense, divergent national recognition regimes for foreign judicial sales come into play. For a purchaser, even if the entity has a certificate evidencing a judicial sale that has complied with all requirements under the convention in the sale state, there remains uncertainty as to whether or not the title would be recognised before a ship registry or court in a state party other than the one conducting the sale. Unpleasant results may arise. For instance, the purchaser might face a denial of recognition following a lengthy *révision au fond*.¹⁰⁷ Arguably, therefore, the convention has limited bearing upon the certainty of the title effected under this convention.¹⁰⁸

In conclusion, the MLM Convention 1993 does not sufficiently address the recognition matters. Specifically, the conditions to be met for recognition are not clarified. Without rules in this respect, that convention cannot guarantee the validity of the title worldwide, although the uniform rules of the sale procedure and the introduction of the certificate must have repercussions on the recognition proceeding.

4.2. Research question 2: How do selected jurisdictions validate foreign judicial sales?

Research Question 2 examines the recognition proceedings before courts in four legal systems, *viz.*, English, Dutch, Chinese and Maltese laws, as well as the recognition processes before registries in three countries – Italian, British and Liberian registries. The outcomes of the research are presented below in two parts. The first part discusses recognition by courts. The second part analyses recognition by registries. A discussion of the findings is made at the end of this section.

4.2.1. Part 1: Divergences and convergences of court recognition

Courts in selected legal systems use very different solutions to decide the validity and effects of foreign judicial sales. That said, the consequences pertaining to the acceptance of foreign sales are similar – the purchaser's title obtained via sale will be regarded as valid and thus operate *erga omnes* in the recognising state.¹⁰⁹

In general, two methods in private international law are viable for foreign judicial sales: the material recognition method, *i.e.*, identifying the applicable law for

¹⁰⁷ Like in the Maltese case involving the ship *Bright Star*, see Section 4.2 of Paper 2.

¹⁰⁸ See Section 4 of Paper 1.

¹⁰⁹ See Section 6.1 of Paper 2.

judicial sales, and the procedural recognition method, *i.e.*, treating foreign judicial sales as a matter to be dealt with under the regime of recognition and enforcement of foreign judgments. As shown below, Chinese¹¹⁰ and Maltese laws¹¹¹ follow the former, whereas English and Dutch laws adopt the latter.¹¹²

Maltese law invokes the *lex fori*. When deciding the effects of a foreign judicial sale, a Maltese court will look to its own law, the Maltese law, more specifically, Section 37 D of the Merchant Shipping Act. Section 37 D provides that special privileges,¹¹³ registered mortgages, and charges under the Civil Code, are extinguished by a “sale” pursuant to an order or with the approval of a competent court within whose jurisdiction the vessel was at the time of the sale, the interests of creditors shall pass on to the proceeds of the sale of the vessel. Accordingly, the purchaser obtains a clean title. In this sense, in order for a foreign sale to have effect in Malta, three conditions must be met. First, the ship was situated within the foreign court’s jurisdiction at the time of sale. Second, the foreign court was competent to carry out the sale. Third and probably the most contentious, the creditors’ interests have been passed onto the proceeds. Based on the third condition, The Maltese Superior Court of Appeal invalidated a Jamaican judicial sale in 2019, bringing repercussions to the shipping community.¹¹⁴ In that case, the Maltese court held that, by virtue of the doctrine of reciprocity, any Maltese right on a ship must have been given the same significance as provided for under Maltese law in a foreign sale by the foreign court, in order for the Maltese court to render that all interests on the ship have been passed onto the proceeds.¹¹⁵ By the nature of applicable law, any

¹¹⁰ Chinese law provides for the recognition of foreign constitutive judgments, however, the concept of judgments, as shown in Chinese jurisprudence and various treaties on recognition, seems confined to court decisions on the merits in civil or commercial matters rendered in the adjudication stage. Furthermore, on 31 December 2021, the Chinese SPC issued a conference summary which is likely to be observed by Chinese courts when recognising foreign judgments. Article 41 of that summary defines judgments for recognition purposes, which states that foreign judgments to be recognised shall be legal documents by foreign courts and upon substantive disputes in civil or commercial cases. It seems reasonable to infer that court decisions given in the enforcement stage for realising the judgment debts are not judgments. In conclusion, the recognition procedure for foreign judgments cannot be invoked for foreign sales, which are an enforcement measure.

¹¹¹ Maltese law permits the recognition of foreign constitutive judgments, however, the applicable law criterion requires Maltese law to be applied in the case, so the *prima facie* viable recognition method is unavailable. see Section 4 of Paper 2.

¹¹² See Paper 2.

¹¹³ The Merchant Shipping Act, s 50 lists out these privileges.

¹¹⁴ This case was explained in the Introduction part of this kappa, see footnote 9 and its accompanying texts.

¹¹⁵ Thompson (n 12).

conditions not explicitly listed out in Section 37 D might be invoked for invalidating a foreign sale, if deemed relevant by the court seized.¹¹⁶

Chinese law applies the *lex causae* and provides a plethora of options. Chinese private international law does not assign a conflict of laws rule to judicial sales as a legal concept. Nor are judicial sales subsumed into the legal situation concerning the ship's ownership, which has a conflict rule (*lex registrationis*).¹¹⁷ Under the Maritime Law of the People's Republic of China (Chinese Maritime Law), the law governing the maritime right based on which a challenge against a judicial sale has been made will apply. Thus, in deciding on a challenge, a Chinese court may resort to the *lex fori*, i.e., Chinese law, if the challenge relies on a maritime lien; the *lex registrationis*, if it is a mortgage or a dispute over ownership; the law with the closest and most significant connection, if it is a contractual right.¹¹⁸ Alternatively, according to the Law on Choice of Law for Foreign-Related Civil Relationships of

¹¹⁶ See Section 4 of Paper 2. See also the case involving the ship "Bright Star". In October 2016, a Maltese-registered ship sailed into Jamaican waters and was arrested by the local court. The Jamaican court ordered the sale of the ship, free and unencumbered, to satisfy the mortgagee who was registered in Malta and three other creditors. The successful bidder paid 10.3 million US dollars and subsequently registered the ship in Liberia under the name Bright Star. Notwithstanding the fact that the Jamaican court had reserved 3 million US dollars for the sole reason of satisfying the mortgagee, the said mortgagee did not pursue the deposited money in accordance with the Jamaican procedure but chose to arrest the ship later in June 2018 when she entered Maltese waters. The Maltese court confirmed the application of Section 37 D of the Merchant Shipping Act to the situation where the legal effects of a foreign judicial sale were to be determined. Given that the Jamaican court did not recognise the executive force that a Maltese mortgage had, nor the privileged ranking of the mortgagee under Maltese law, by virtue of the principle of reciprocity, the Maltese court held that the interests of the mortgagee had not been effectively passed onto the proceeds, and denied recognition to the Jamaican sale

¹¹⁷ The Maritime Law of the People's Republic of China (Chinese Maritime Law), effective 1 July 1993, s 270.

¹¹⁸ Chinese Maritime Law, s 269 (contracts), s 270 (ownership), s 271 (mortgages) and s 272 (maritime liens). See also the case "The Phoenix". In 1999, the Phoenix was registered in St Vincent and the Grenadines, and a mortgage was recorded there. In 2004, the ship was judicially sold in the North Korean court and subsequently sold on by the purchaser to the defendant in the later Chinese case. The defendant registered the ship in Belize and changed her name to Union on 7 July 2005. Later, as the ship entered the port of Tianjin, China, the mortgagee, relying on the judgment for the mortgage debt obtained in Paris, applied to the Tianjin Maritime Court for the arrest of the ship. The ship was arrested on 27 June 2005. The defendant requested the ship be released on the basis that the North Korean Judicial sale gave clean title free of all encumbrances. The Tianjin Maritime Court, by virtue of Article 271 of the Maritime Law, held that the law of the flag, i.e., the law of St Vincent and the Grenadines, should apply to decide the validity of the mortgage. However, the parties to the proceeding did not prove the foreign law to the court. That being so, Chinese law was applied instead. Then, in accordance with Chinese law, the Tianjin Maritime Court gave effect to the North Korean sale and held that the mortgage claimed was purged by that sale. As to whether the North Korean sale was concluded as provided for under the law of North Korea, it was stated that owing to the sovereign principle, a Chinese court was not competent to examine the proprieties of a foreign proceeding. The ship was released after the mortgagee's claim was dismissed.

the People's Republic of China (Chinese Choice of Law),¹¹⁹ judicial sales may be treated as a legal concept entitled to a conflict rule but not yet have one. In that case, the law with the closest and most significant connection can apply. Considering the internal consistency between Chinese property law¹²⁰ and maritime law, as well as equal access to justice for foreign judicial sales, it is suggested in this dissertation that the *lex situs* at the time of sale should be the applicable law. As shown in one Chinese case,¹²¹ when Chinese law itself is designated as the applicable law, a Chinese court might refrain from *révision au fond* but would be ready to validate the title effected in a sale by a foreign court with jurisdiction.¹²²

In English law, what is recognised is a judgment *in rem* whereunder the sale of a ship is decreed to satisfy a claim against the ship. This judgment is recognised *qua* an assignment rather than *qua* a judgment. Recognition of the judgment amounts to acceptance of the authority and effectiveness of the judgment and its subsequent sale. When a purchaser seeks recognition, what is recognised is not a judgment, but the title to the ship deriving from the judgment.¹²³ Three doctrines are in support of such recognition: (a) the general principle of general maritime law concerning judicial sales,¹²⁴ (b) the general principle that *lex situs* governs dispositions of property,¹²⁵ and (c) the comity of nations. There are six prevailing conditions for recognition. Two are specific conditions for judicial sales, set forth by Blackburn J in *Castrique v. Imrie*:¹²⁶ which is high authority, (i) the ship is within the territorial jurisdiction of the foreign country at the time of sale; and (ii) the foreign court is competent under its own law to adjudicate on property dispositions rather than merely parties' rights. Four are common conditions shared with general judgments:¹²⁷ (iii) the judgment is final and conclusive under the law of the state in

¹¹⁹ Effective 1 April 2011. Article 2.

¹²⁰ The conflict rule governing the transfer of movables is the *lex situs*. Chinese Choice of Law, s 2.

¹²¹ (2005) Jin Hai Fa Shang Chu Zi No 401 ((2005)津海法商初字第 401 号) (China, Tianjin Maritime Court). The sale involved in this Chinese case was later recognised by the Supreme Court of Eastern Caribbean, see *The Phoenix* [2014] 1 Lloyd's Rep 449 (St Vincent and the Grenadines, Eastern Caribbean Supreme Court).

¹²² See Section 5 of Paper 2.

¹²³ Dicey et al. (n 58) para 14-110; Myburgh (n 6) 13.

¹²⁴ William Tetley and Robert C. Wilkins, *Maritime Liens and Claims* (International Shipping Publications 1998) 1098.

¹²⁵ Dicey et al. (n 58) rule 128: the law of a country where a thing is situated determines whether (1) the thing itself is to be considered an immovable or a movable; or (2) any right, obligation, or document connected with the thing is to be considered an interest in an immovable or in a movable.

¹²⁶ (1870) LR 4 HL 414, 428-429, [1870] 4 WLUK 1.

¹²⁷ For all conditions for recognition, see Jackson (n 26) para 27.34.

which it was rendered; (iv) the sale was not fraudulently procured; (v) the sale does not offend public policy; and (vi) the sale does not violate natural justice common to almost all nations.¹²⁸

In Dutch law, constitutive judgments whereunder pre-existing legal situations or relations are modified have *erga omnes* effects; and, by virtue of the doctrine of comity, foreign judgments, including constitutive judgments, are susceptible of recognition in the Netherlands. Hence, foreign judicial sales can be recognised under the regime for recognising foreign constitutive judgments. In that case, the judgment that is issued upon the completion of the sale and orders a transfer of title valid against the world is the constitutive judgment to be recognised. This kind of judgments is a common construct existing in various jurisdictions, albeit called differently. For example, in English law, it is a marshal's bill of sale; in Maltese law, a bill of sale (*procès-verbal*); and in Chinese law, a court ruling affirming the auction upon sufficient payment. The Dutch Supreme Court set out five conditions for recognition of foreign judgments, briefly, being: (i) the foreign court was competent in terms of international jurisdiction or generally accepted rules; (ii) the proceedings were fair; (iii) the judgment does not offend Dutch public policy; (iv) there is no irreconcilable conflict with another judgment between the same parties and over the same cause of action; and (v) the original judgment is enforceable in its own legal system.¹²⁹ In addition, in recognising a constitutive judgment, whether the applicable law for the matter decided is in line with the Dutch conflict rules, in

¹²⁸ See Section 2 of Paper 2. See also the case involving the ship “Hidir Selek”. In June 2003, the ship Hidir Selek flying the Turkish flag, was arrested in Tianjin, a port of China, by a German bank as holder of a mortgage on her. In October 2003, the Tianjin Maritime Court of China, at the application of the arrestor, ordered the ship to be auctioned on the grounds that the arrest period expired, yet the respondent failed to provide security for release, and the ship was not suitable for being indefinitely under arrest. Then, the Tianjin Maritime Court adjudicated the claim over mortgage, and gave a judgment that allowed the mortgagee to be satisfied from the sale proceeds.

Later, in 2004, Hidir Selek was arrested in the Netherlands by her previous Turkish shipowner. The previous shipowner based its claim on Dutch private international law, whereby the applicable law to determine the ship's proprietary rights was the *lex registrationis*. It was alleged by the previous shipowner that, since Turkish law mandated that a Turkish-registered ship could not be judicially sold abroad, the Chinese judicial sale that happened in 2003 was illegal and thus, the ship's ownership had not changed. The Dutch court seized disagreed, holding that insofar as the ship was situated within China when sold, the validity of the sale and its effects on the proprietary relations regarding the ship must be determined by the *lex executionis*, Chinese law. The *lex registrationis* had no role to play in this situation. The Dutch court recognised the effects of the Chinese sale, and decreed to lift the arrest.

¹²⁹ The Netherlands Commercial Court lists out these conditions on its website, see <<https://www.rechtspraak.nl/English/NCC/Pages/enforcement.aspx>> accessed 22 November 2021. See also Lief Bleyen, *Judicial Sales of Ships: A Comparative Study* (Springer 2016) 93.

this case being the *lex executionis*, is examined (vi).¹³⁰ As the jurisdiction condition requires the ship's presence within the territory of the foreign state at the time of sale, the *lex executionis* is also the *lex situs*.¹³¹

The recognition conditions in English law are comparable with their counterparts in Dutch law, in order to emphasise differences in the recognition regime between these two states.

The jurisdiction of a foreign court refers to the international or indirect jurisdiction. English law subjects the jurisdiction scrutiny to the actual *situs* of the *res* at the time of sale. Dutch law is similar in this matter, using the ship's location as a criterion for deciding whether a foreign court had jurisdiction over the ship. The time of the sale is loosely stated in both legal systems. Since jurisdiction provides a valid basis for the foreign court to proceed, the traditional common law approach for recognising judgments *in personam*, which measures the jurisdiction when the proceeding was instituted, may be extrapolated to foreign sales. In that case, the time to measure the *situs* of the *res* would be when a sale order is issued. In the pragmatic world, a ship arrest usually precedes the sale. Thus, when a sale is ordered, the ship's presence within the territory may not be a problem. Noteworthy, English law also requires the foreign court to have competence under its own law to adjudicate on property dispositions. This competence rule is more in nature of a definition of recognisable foreign sales, which limits the applicability of the recognition regime to only foreign sales made in the exercise of a jurisdiction analogous to the English admiralty jurisdiction.¹³²

Since a judgment becomes final when its pertinent sale is not subject to appeals or cannot be set aside, the finality of the judgment amounts to the finality of the sale. Both English and Dutch laws submit the existence of finality of a foreign sale to the *lex situs*. However, the meaning of finality differs. In English law, a recognisable judicial sale is a sale made in the exercise of a jurisdiction analogous to the English admiralty jurisdiction which is competent to adjudicate on property dispositions rather than merely parties' rights. Such a sale confers a clean title valid against the world. Thus, a final sale must produce a clean title. However, in Dutch law, a constitutive judgment establishes a legal situation with *erga omnes* effect. As long

¹³⁰ Rene Ch. Verschuur, 'Recognition and Enforcement of Foreign Judgments in the Netherlands' in Gerhard Walter (eds.), *The Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions* (Kluwer Law International 2000) 403-425, 406.

¹³¹ See Section 3 of Paper 2.

¹³² See Sections 2.2, 3.2 and 6.2.2 of Paper 2.

as a title effected in a sale is good against the world, that sale will be considered final. Whether or not the title is clean does not matter.¹³³

The applicable law requirement, as existing in Dutch law, examines whether the correct law as decided by the forum's conflict rules has been applied. It may affect judicial sales seeking recognition in a legal system, which does not designate the *lex situs* as the applicable law for judicial sales. Maltese law gives a proper illustration of this point. Maltese law has a similar regime as that in Dutch law for recognising constitutive judgments whereunder property assignments are ordered. However, the Maltese private international law invokes the *lex fori* for judicial sales, so the Maltese recognition regime, in reality, cannot apply. As suggested, the applicable law criterion should be removed from national laws.¹³⁴

Substantial procedural improprieties may be examined under the condition of natural justice by an English court or the criterion of fair trial by a Dutch court. Generally accepted objections of this kind include lack of notice, undue interference of the court, and inadequate price. Notwithstanding similarities in the name and concept, the determination of these objections is subject to different criteria. Accordingly, a circumstance enough for substantiating an objection in Dutch law may be insufficient in English law. A comparison with regard to lack of notice provides an example. In English law, notice may not need to be given where the foreign law does not mandate notice to be given. In *Altantic Ship Supply v. M/V Lucy*,¹³⁵ the mortgagee who claimed that the sale breached natural justice on the ground of lack of notice was not supported by the court, for reason that under the foreign law no notice should be given.¹³⁶ In contrast, under Dutch law, when determining lack of notice, the criterion is whether the notice was reasonably arranged in the circumstances to lead to actual notice. Whether foreign procedural rules governing service or the Dutch legislation concerning service have been correctly applied does not matter.¹³⁷

Fraud needs caution. Despite being a conceivable base to refuse foreign judgments in both English and Dutch laws, English law scholars find it dubious about invalidating the title of a *bona fide* purchaser on the ground of fraud. In *Castrique v. Imrie*,¹³⁸ Blackburn J. distinguished general judgments and judicial sales, asserting that fraud does not necessarily have a bearing upon a *bona fide* purchaser

¹³³ See Section 6.2.1 of Paper 2.

¹³⁴ Domej (n 56) 1478. See Section 6.2.2 of Paper 2.

¹³⁵ (1975) 392 F. Supp. 179 (US, M D Fla)

¹³⁶ See Section 2.2 of Research Paper 2.

¹³⁷ See Section 3.2 of Research Paper 2.

¹³⁸ (1870) LR 4 HL 414, 433, [1870] 4 WLUK 1. See Sections 2.2, .2 and 6.2.2 of Paper 2.

who obtained the title in a sale procured by fraud. Dicey, Morris and Collins further justify this distinction, alluding to the general principle governing property dispositions. They assert that the degree of recognition to be given to a judgment *in rem* is subject almost entirely to the *lex situs*. Despite this, one may expect that the title will be invalidated if fraud constitutes a substantial procedural irregularity.¹³⁹

Public policy is a broad-scope concept that varies with time. Any situation that violates the fundamental legal values of the requested state may be deemed to offend public policy, including substantial procedural improprieties and fraud. It must be emphasised that public policy, as a corrective measure of last resort, does not come into play often, particularly not because of a mere difference between national laws. At least, in English case law, for the time being, no approved objections to recognition based on public policy seem to fit with judicial sales.¹⁴⁰ Dutch law provides some guidance for public policy. If foreign law is deemed as improper law in terms of Dutch public policy, the foreign law governs matters impossible or not allowed under Dutch law, or the recognition of a foreign judgment may impair the interests of Dutch citizens,¹⁴¹ the objection grounded in public policy will be accepted.¹⁴²

4.2.2. Part 2: Divergences and convergences of registry recognition

The freedom of unrestricted access to the high seas goes hand in hand with a cardinal rule that every ship at sea shall possess a nationality, lacking which the ship may be liable to seizure or detention.¹⁴³ Thus, after a judicial sale, the purchaser must register the ship in a competent form showing its own name as the owner. But this may not be easy. As shown below, a considerable divergence in the registration process following a judicial sale exists.

English law provides a recognition procedure with limited applicability for foreign judicial sales. A British REG registrar may recognise the purchaser's title obtained in a foreign judicial sale, if certain public documents are submitted, including a certified copy of the judgment *in rem* whereunder the ship sale was decreed (the

¹³⁹ See Sections 2.2, .2 and 6.2.2 of Paper 2.

¹⁴⁰ Dicey *et al.* (n 58) 735-740. Approved objections grounded in public policy include: family law matters not supported in English law, the judgment was rendered based on a contract executed as a result of undue influence, the judgment was obtained in disobedience of an injunction not to sue in a foreign court, and the judgment is against the Human Rights Act 1998.

¹⁴¹ Verschuur (n 127).

¹⁴² See Sections 2.2, .2 and 6.2.2 of Paper 2.

¹⁴³ Coles *et al.* (n 69) para 1.1.

court sale order),¹⁴⁴ the appointment of an officer to carry out the sale (the appointment of marshal), and the bill of sale given by that officer (the marshal bill of sale).¹⁴⁵ If the purchaser is qualified to own a British ship, the purchaser can inscribe the transfer of ownership in¹⁴⁶ or deregister the ship from the British registry.¹⁴⁷ Alternatively, the purchaser may first register the transfer and then delete the ship from the British registry. In this vein, the purchaser can obtain a closed transcript showing his or her name as the owner.¹⁴⁸

However, this recognition procedure seems viable only to sales conducted in the countries, the sale procedures of which correspond to that under English law. Typical examples are made by courts in Commonwealth countries. For sales from other states whose sale procedures do not produce the said documents, the British registrar must decide whether alternative documents can be accepted. This waiver process can be lengthy. More to the point, it may become a conflict analysis, as the evidence of foreign law will be required, and the effectiveness of the foreign sale will be decided against the English private international law respecting the property transfer.¹⁴⁹

When a foreign-flagged ship sold by a court in a foreign legal system seeks to enter a British REG register, the British registrar will require evidence of reasonable efforts made by the purchaser to delete the former registration.¹⁵⁰ Hence, British registrars invoke the *lex registrationis* for this situation in general.

The same requirement exists under Italian law which has a specific recognition procedure for foreign judicial sales, which has a limited scope of application. According to Article 157 (1) of the Navigation Code, if the purchaser seeking recognition is a non-EU person, the purchaser must file a notice to the registration office where the ship is registered, within sixty days of the date of sale, in order to obtain a deletion certificate.¹⁵¹ Receiving the filing, or, absent filing, after the registration office becomes aware of the fact, the registry will inform the holders of

¹⁴⁴ Dicey *et al.* (n 58) para 14-109.

¹⁴⁵ Hartley (n 68) 15.

¹⁴⁶ The Merchant Ship (Registration of Ships) Regulations 1993, regulation 28 (1) (iii). See also Hartley (n 68) 15.

¹⁴⁷ *ibid.*, regulation 56 (5) (a).

¹⁴⁸ Roger Heward, 'England and Wales Part III. Judicial Sales of Vessels and Priority of Claims' in Christian Breitzke and Jonathan Lux (eds.), *Maritime Law Handbook* (Kluwer Law International BV 2019) 13-14.

¹⁴⁹ As alluded to earlier, in English law, the applicable law for property dispositions is the *lex situs*.

¹⁵⁰ The Merchant Shipping Act 1995, s. 9 (5). Coles *et al.* (n 69) para 25.30.

¹⁵¹ The Code of Navigation (Codice della Navigazione), approved by Royal Decree 30 March 1942, n. 327, a 155. Hereinafter referred to as Italian CN.

registered encumbrances, as well as the national social security institute,¹⁵² and then proceed to deregister the ship.¹⁵³

When the purchaser is an EU person,¹⁵⁴ this recognition procedure does not apply. In that case, the purchaser may first reregister the ship in its own name, then, as a registered owner,¹⁵⁵ deregister it through the general deregistration procedure. Notably, in an Italian judicial sale, the execution judge will, upon sufficient payment, order by decree the ship to be transferred to the purchaser and the ship registration office to delete all mortgages and attachments.¹⁵⁶ Upon the receipt of the decree, the registration office will inscribe it and free the ship from encumbrances.¹⁵⁷ Admittedly, foreign sales evidenced by foreign public documents are not a case for the said rules. However, by virtue of the basic principles of equal treatment, it seems reasonable to extend the recognition readily accorded to non-EU purchasers under Article 157 (1) to the case here. Namely, like in an Italian sale, the purchaser in a foreign sale, who wishes to inscribe a transfer of title, can produce the foreign public documents to evidence its title to the ship and thereby request to inscribe a transfer of title.¹⁵⁸ After reregistration, if the new owner wishes to deregister the ship, Article 156 of the Navigation Code applies. Article 156 requires the owner to obtain authorisation from the Italian registry for deregistration. After being informed, the registration office will, by announcement, invite interested persons to make their rights known and raise opposition within sixty days.¹⁵⁹ Only if the opposition has been set aside by a decision with *res judicata*, the claim has been satisfied, or the owner has provided adequate security, the registration office will proceed with the deregistration.¹⁶⁰ In case the owner plans to transfer the ship to another EU country, the public notice period of sixty days can be dispensed. After

¹⁵² Italian CN, a 552 (3). A maritime lien is granted in respect of claims of social insurance institutions and of crew maintenance and repatriation.

¹⁵³ *ibid*, a 157 (2). Worth mentioning, in an English case where an Italian ship was sold, the purchaser had problems deregistering the ship, due to the mortgage being registered on that ship. *The Acrux* [1962] 1 Lloyd's Rep 405, [1962] 4 WLUK 39.

¹⁵⁴ Including Italian citizens.

¹⁵⁵ Construing the provisions of Article 156 systematically, the owner who can initiate a deregistration procedure may only be read as referring to the registered owner. Thus, the purchaser cannot deregister the ship directly, without being first registered as the new owner.

¹⁵⁶ Italian CN, a 664.

¹⁵⁷ *ibid*, a 678.

¹⁵⁸ Italian CN, a 146; the Italian Navigation Regulations, a 315. See also Berlingieri et al. (71) 6.

¹⁵⁹ Italian CN, a 156.

¹⁶⁰ *ibid*, a 156 (4).

receiving the purchaser's declaration, the Italian registry will directly delete the ship, subject to the absence or satisfaction of registered rights and encumbrances.¹⁶¹

As an irrefutable rule, a foreign-flagged ship must be deregistered before it can be recorded in the Italian register. This is the same case for foreign ships judicially sold outside Italy. A closed transcript must be obtained; otherwise, the Italian registry will not register the ship.¹⁶² Thus, the *lex registrationis* applies to the situation concerned.

Liberian law does not draw a line between domestic and foreign judicial sales,¹⁶³ but distinguishes deregistration from reregistration. Procedural recognition is available only for reregistration. After the judicial sale of a Liberian ship, if the new owner wants to continue under the Liberian flag, the Liberian registry will grant such, provided that the new owner can submit certain certified documents attesting to the sale. Those documents include the court sale order, the marshal bill of sale and sometimes an attorney's affidavit explaining the legal effects of the sale.¹⁶⁴ As to the former registration documents issued by the Liberian registry to the ship concerned, if the commissioner or its agent is satisfied that a ship is judicially sold or transferred and the former owner retains the ship's document, a new document may be granted upon the owner complying with the registration requirements, with the exception of surrendering the former registration documents.¹⁶⁵ It is worth mentioning that Liberia simplifies the formalities with which the subsequent purchaser establishes its title for registration purposes.¹⁶⁶ If the new owner is the subsequent purchaser, the Liberian registry does not require the initial purchaser to be first registered as the owner to allow the title to pass down to the subsequent purchaser. A bill of sale in the proper form as required by Liberian law is sufficient to evidence the interim transfer of property.¹⁶⁷

Deregistration may entail a conflict of laws analysis. Liberian law prescribes limited situations where deregistration following judicial sales is attainable through a specific procedure. According to Article 102 (2) (b) of the Liberian Maritime Law,

¹⁶¹ *ibid*, a 156 (9).

¹⁶² See Berlingieri *et al.* (71) 6; Pagliara (n 71).

¹⁶³ Liberian ML, s 29 (7): the term "judicial sale", as used throughout this Title, shall mean any sale of a vessel of a competent authority by way of public auction or private treaty or by any other appropriate ways provided for by the law of the State of judicial sale by which title to the vessel free of mortgages and any other encumbrances is issued to the purchaser and the proceeds of sale are made available to the creditors.

¹⁶⁴ *ibid*, s 102 (2) (b).

¹⁶⁵ *ibid*, s 73 (2).

¹⁶⁶ Hengen *et al.* (n 70) 8.

¹⁶⁷ *ibid*.

when the ship is lost, destroyed or transferred to another register following a sale by order of an admiralty court in a civil action *in rem*,¹⁶⁸ the commissioner or its deputy may strike off the ship from the Liberian register, after informing the recorded mortgagees of its intention to strike off, 90 days before the striking-off. What the Liberian registry will do if a Liberian ship has been judicially sold but yet registered in another place is unclear. As suggested, applicable law might be used to determine the effects of the sale. The law applicable to this scenario is the law of the state where the ship is found and sold.¹⁶⁹

When a foreign-flagged ship following its sale in a foreign state wishes to be flagged in Liberia, the Liberian registry will readily grant it upon the production of the documents required for reregistration, with a waiver of the closed transcript.¹⁷⁰

In conclusion, flag states, facing domestic ships that have been judicially sold abroad, would like to accept the purchaser's title if foreign court documents can be provided, *i.e.*, procedural recognition of foreign sales is viable. The problem lies in the limited applicability of the recognition procedure. British registry limits applicability by reference to the country selling the ship, the Italian registry by reference to the nationality of purchasers, and the Liberian registry by reference to the registration action. Likewise, when a foreign ship sold abroad is considered, different actions are taken across countries. The Liberian registry is generous to parties seeking new registration to the extent that they are usually ready to dispense with the requirement of closing the previous registration. Namely, procedural recognition is granted. In contrast, the British and Italian registries follow the *lex registrationis*, always requiring a closed transcript.

4.2.3. Discussion

Upon the findings of Parts 1 and 2, two propositions are made. First, procedural recognition is the method by which recognition of foreign judicial sales is more feasible, on the basis that it avoids *révision au fond* and brings predictability and certainty. By this method, potential bidders could predict whether or not the title to be conferred via judicial sale would be respected and registered in a defined foreign state. Moreover, the legal certainty, envisaged by reasonable persons engaging in

¹⁶⁸ The reference to “admiralty court and action *in rem*” can only be found in common law jurisdictions, and this wording differs from the text of Section 29 (7) of the Liberian Maritime Law whereunder judicial sales are defined in a broad and neutral sense, compatible with other legal traditions. Be that as it may, at least, it can be said that the sales alluded to in Section 102 are judicial sales as concerned in the Liberian Maritime Law. Whether or not a specific judicial sale from a non-common law jurisdiction can be recognised as an admiralty court sale under Section 102 is left for the Liberian commissioner to decide.

¹⁶⁹ Liberian ML, s 112 (2). See footnote 66 and its accompanying texts.

¹⁷⁰ Liberian ML, a 51 (7). See Hengen *et al.* (n 70) 6-8.

maritime ventures, and required by the general principles underlying almost all national maritime laws, that a judicial sale produces a title with *erga omnes* effect, is maintained. Second, recognition is not guaranteed when procedural recognition is followed. As shown above, the recognition procedures are diverse in various aspects of the law. The title pursuant to recognition methodologies is different; the finality of a judgment (as explained above, is tantamount to the finality of a sale) has varying definitions; the standards generally accepted as conditions for recognition of foreign sales are assessed against different criteria, although these conditions are similar in name and conceptual content. Besides, flag states qualify the application of the recognition procedure by reference to different matters.

Therefore, a harmonised approach is needed to assure recognition of foreign judicial sales. This approach must avoid *révision au fond*, have an agreed definition of finality and set forth self-explanatory recognition conditions. In addition, with regard to change of registration, this approach must ensure equal treatment for all foreign sales, which can also lessen the burden of the registrar to examine foreign laws.

4.3. Research question 3: How do selected jurisdictions carry out judicial sales?

Research Question 3 examines the sale procedures in defined legal systems. The research findings are presented in two sections of this kappa: Section 2.1 explains the concept of judicial sales of ships, and Section 4.3 finds similarities and dissimilarities in selected national sale procedures, identifies principles embedded in those procedures, and discusses the relevance of principles informing sales to the recognition of foreign sales.

There are four procedural stages identical to the studied legal systems, *viz.*, being, the initiation of a sale, preparation for the sale, concluding the sale, and payout after the sale. In the following, a comparison of national sale procedures is made based on these stages. After that, principles embedded in sale procedures are identified and discussed.

4.3.1 The initiation of a sale

Basically, three requirements must be met for a sale can be initiated: (i) there is a ship to be disposed of by means of a judicial sale; (ii) the claimant has standing to

request a sale before a competent authority such as a court with requisite jurisdiction; (iii) and the ship is arrested prior to the sale.¹⁷¹

The asset that can be categorised as a ship for judicial sale purposes differs across states. English law does not have a definition of a ship for the purpose of arrest and sale, but there is a general definition with regard to invocation and application of admiralty jurisdiction. The criterion “used in navigation”, which means that the craft is capable of being navigated in navigable waters for the purpose of transporting people or goods at the destination, is used to determine whether the craft in question is a ship. Thus, vessels used in non-tidal waters other than harbours, and ships under construction and pleasure vessels are excluded. The same criterion, “used in navigation”, prevails in Maltese law, but unlike English law, Malta includes floating establishments or structures, and ships under construction into the conceptual scope of ships. Dutch law provides a sweeping definition of ships, whereby all things, except for aircraft, that according to their construction are intended for floating, and do float or have floated, are ships. Chinese law defines ships in its maritime law, providing that vessels no less than 20 gross tonnage and mobile at sea constitute ships. It can be said that any vessel used at sea and able to transport people and cargoes from one place to another is a ship for judicial sale purposes.¹⁷²

The person entitled to initiate a sale and the authority competent for sale vary from state to state. A fundamental distinction can be drawn between the state that allows a sale pending judgment and the state that requires the applicant to have an enforceable title. In English law, although it is common for a sale to take place after a judgment is rendered, by virtue of the inherent jurisdiction of the Admiralty Court, a sale may be ordered when requested by any party at any stage in an action *in rem*, which is against the ship, initiated by issue of a claim form and must be brought before the Admiralty Court. The Admiralty Court will accede to the request if only a good reason for sale is substantiated. In contrast, Dutch law mandates that the sale of a ship must be based on an enforceable title against the shipowner or secured by a privilege *vis-à-vis* the ship. Maltese and Chinese laws provide a mixture of approaches. Generally, they require an enforceable title for initiating a sale, but sales *pendente lite* are viable if certain requirements are met. Comparing the relevant rules governing sales pending action in the three jurisdictions mentioned above, there is a convergence that is easy to obtain. A court will do a critical review before acceding to the sale application by examining various matters in relation to the claim and the ship. Usually, a sale *pendente lite* may be ordered if the claim is purportedly valid and not defended, the ship continuously loses value while under arrest, and the debtor seems unable to repay the debt.¹⁷³

¹⁷¹ See Sections II.1 of Paper 3.

¹⁷² See Sections II.1.A of Paper 3.

¹⁷³ See Sections II.1.B of Paper 3.

The public authority for sale differs considerably. In English law, the ship must be arrested in the action *in rem* in which the sale is petitioned, and the court involved will always be the Admiralty Court. In Dutch law, the district court within whose competence the ship sits has jurisdiction for executive arrest, which leads to a sale. Then, the civil notary will actually conduct the sale. In the context of a foreign ship, the court that arrested the ship can sell the ship if requested by the arrestor. Maltese law provides that the court that rendered the judgment, or the court competent to take cognisance of the ship when other executive titles are enforced, is competent for judicial sale. Chinese law distinguishes maritime courts and district courts. The maritime court that arrested the ship can sell the ship. If a district court receives a sale application from the creditor with an enforceable title, it must entrust the competent maritime court¹⁷⁴ to carry out the actual arrest and sale.¹⁷⁵

The ship must be under the control of the authority carrying out the sale. Thus, a ship arrest precedes the sale. Across studied jurisdictions, a ship arrest is effectuated by means of an arrest warrant, which is to be executed by a court officer, such as a bailiff or admiralty marshal. During the arrest period, either the marshal, the person appointed by the court officer, or the shipowner or bareboat charter, must be responsible for the ship. The expenditures and costs of the arrest are always given a high priority in the distribution. Despite these common practices, a peculiarity exists in Dutch law with regard to arrest. Dutch law allows an executive arrest when the ship is not within the Dutch territorial waters. Based on a link between the Netherlands and the claim, typically a Dutch mortgage, a ship can be held under executive arrest without the physical detention of the ship. That is impossible under English, Maltese and Chinese laws.¹⁷⁶

4.3.2 Preparation for the sale

Usually, three preparatory arrangements are made by the authority for sale before the actual sale takes place; namely, service of the documents in relation to the sale, appraisalment of the ship's value, and notification and publication of the sale.¹⁷⁷

The documents necessary to initiate a sale, such as the notice of a sale application, the arrest warrant, or the command of payment, must be served. Such that, interested parties are informed of the sale on time and thus have a chance to raise objections. Depending on the jurisdiction carrying out the sale, different persons are responsible for the service duty, and varying persons are entitled to receive service. In English

¹⁷⁴ The maritime court within whose competence the ship lies or the port of registry of the ship.

¹⁷⁵ See Sections II.1.B of Paper 3.

¹⁷⁶ See Sections II.1.C of Paper 3.

¹⁷⁷ See Sections II.2 of Paper 3.

law, any party may effect service. Contrarily, Dutch and Chinese laws only contemplate service by court officers. In Maltese law, in principle, service is effected by the court officer; however, in an arrest, the person indicated by the arrestor can effect service if the court permits it. Apart from the executor, the shipowner, and the debtor if different from the shipowner, the creditor qualified to receive service greatly diverge: in English law, only persons who have entered caveats; in Dutch law, registered mortgagees; in a Maltese sale, all arrestors and probably registered mortgagees¹⁷⁸; Chinese law does not contemplate service to creditors, but these parties are notified of the sale later.¹⁷⁹

Appraisalment of the ship's value is optional in some states while mandatory in others. Both English and Chinese laws require the ship to be appraised before the sale is advertised, but the former keeps the appraised value confidential, whereas the latter makes it available to the public. Malta allows an appraisal if requested by the creditor or debtor. The Netherlands permits the executor to propose the minimum price, indicating that the executor is responsible for appraisalment.¹⁸⁰

Publicity of the sale by publication in the press or other medium is a procedural requirement common to all the jurisdictions examined in the research. Also, the information to be contained in the advertisement is similar, generally including the ship's particulars, the form of sale, the inspecting of sale, and necessary information that enables parties to protect their interests.¹⁸¹ However, different jurisdictions treat notification of the sale differently. Most significantly, persons entitled to notice vary considerably from one state to another. In English law, like the service of documents, notice is given only to those who have entered cautions. Chinese law requires notification to two types of creditors: the registered mortgagee¹⁸² and the known maritime lienholders. Dutch law takes a step further in that; all creditors known to the sale authority must be notified of the sale. Malta seems flexible in this matter, as the court is not bound to inform any creditors of the time and place of the sale.¹⁸³

¹⁷⁸ No legislation requires the notice of a sale application to be served on the registered mortgagee, but in practice, the debtor is expected to do such.

¹⁷⁹ See Sections II.2.A of Paper 3.

¹⁸⁰ See Sections II.2.B of Paper 3.

¹⁸¹ Depending on the jurisdiction involved, it may be the claim underlying the sale, the connect information of the executor and the sale authority, or whether there is a minimum price.

¹⁸² There is no qualification upon the mortgagee entitled to notice in Chinese maritime procedural rules. However, in practice, only the mortgage registered in China is usually considered.

¹⁸³ See Sections II.2.B of Paper 3.

4.3.3 Concluding the sale

The sale may be made through a public tender process or a court-approved private sale. How these two forms of sale are used in defined jurisdictions is explained below.¹⁸⁴

In English law, the standard judicial sale is a private contractual arrangement instigated by the court marshal. Potential buyers can submit written tenders on the prescribed form to the marshal's broker by noon on the appointed day, and the highest tender will be accepted. Upon sufficient payment on schedule, the marshal will issue a bill of sale ordering the conferral of a clean title on the purchaser, and the sale becomes final. If no tender is higher than the appraised value, the marshal will divulge the appraised price and highest price to the executor and cautioners, and seek instructions from the court. The marshal may recommend a re-sale or accepting the highest price.¹⁸⁵

Under special circumstances, a court-approved private sale in favour of a defined purchaser at a fixed price may be granted, before a judicial sale is ordered. That said, English law considers a price not having been "tested" by the market and advertisement as dubious. Even if a private sale could produce the same economic outcomes as a court sale, an English court would still be hesitant to approve it, as it may "blur the line between private commercial self-interest and public judicial administration" and thus impair judicial impartiality.¹⁸⁶ When deciding on a petition for a court-approved private sale, a critical review may be undertaken. General concerns for the state of the market, the maintaining costs of the ship, and the fact that only one claim is attached to the ship, may not suffice for special circumstances.¹⁸⁷

Dutch law requires a judicial sale to be made by auction in a public hearing. This auction consists of two parts, the first being bidding and the second being decreasing. Specifically, prospective buyers first make increasingly higher bids. Then, a price higher than the highest price obtained in the first part is set, and the notary or judgment gradually reduces the price until a bidder says "mine", or the previous highest price is reached. After payment pursuant to the sale conditions,¹⁸⁸ a notarial deed of adjudication or a judgment of sale with minutes of adjudication, will be issued to the purchaser. Once adjudicated, the sale is no longer subject to

¹⁸⁴ See Sections II.3 of Paper 3.

¹⁸⁵ See Sections II.3.A of Paper 3.

¹⁸⁶ Myburgh (n 6) 372.

¹⁸⁷ See Sections II.3.B of Paper 3.

¹⁸⁸ The conditions of sale are drafted by the executor's lawyer.

appeal; the ownership transferred to the purchaser is free of encumbrances.¹⁸⁹ Note that the executor can request a re-sale at the cost of the defaulting bidder in default of payment.¹⁹⁰

A Dutch court may allow a court-approved sale if requested by a Dutch mortgagee. The agreement between the seller and buyer, a list of interested parties, and any further bids received must be submitted for review by the court. An additional appraisal may be ordered before acceding to the sale application. The petition may be denied if the court holds that a better price is possible.¹⁹¹

Under Maltese law, a public auctioneer sells a ship in the presence of the court register, and the sale is not a public auction but in a manner that is the most advantageous to all parties and takes into account the nature of the asset sold. Within seven days after the final adjudication of the sale, the purchaser must make a sufficient payment. After that, the court will issue a bill of sale (*procès-verbal*) declaring the completion of the sale. A re-sale at the expense of the defaulting purchaser may be ordered if the price is not sufficiently paid.¹⁹²

Court-approved sales have met a friendly reception in Malta. So far as the prescribed requirements are provided, the petition for sale by a creditor with an enforceable title may readily be acceded by a Maltese court. The documents to be submitted include two independent appraisals, and evidence that the sale would benefit all known creditors and that the price suggested is reasonable. The sale petition must be served on the person, who is deemed by the court as appropriate to make a case. If, after a court hearing, the sale petition is approved, the court will appoint a representative for the shipowner to transfer the ship and deposit the price in the court.¹⁹³

Chinese courts nowadays sell ships on designated online platforms in general. Within the prescribed time of auction, qualified bidders submit tenders, and the highest tender will be accepted, if not less than the minimum price. After that, a confirmation letter will be automatically generated and posted online. Within ten days after the purchaser pays the price as required in the advertisement, a court ruling confirming the auction will be issued to the purchaser, who will obtain a clean

¹⁸⁹ The legislation in this matter, Article 578 (2) of Dutch CCP, indicates that certain rights may be invoked against the successful purchaser; however, in practice, such rights may not exist. At least, the two most possible rights, the right of retention held by a shipyard, and the usufruct enjoyed by a bareboat charter, probably cannot be maintained throughout a judicial sale. See Section 2.3.1 of Research Paper 2.

¹⁹⁰ See Sections II.3.A of Paper 3.

¹⁹¹ See Sections II.3.B of Paper 3.

¹⁹² See Sections II.3.A of Paper 3.

¹⁹³ See Sections II.3.B of Paper 3.

title upon receiving this ruling. The court will announce the auction's completion and the ship's delivery in the press. If the first online auction fails, the court will take two more auctions with a gradually decreased minimum price. In the situation where a sale still cannot be reached, the ship will be sold at any price under the consent of the creditors whose collective interests are more than 2/3 of the total interests of the claims filed to the court.¹⁹⁴

A sale may be stopped before its conclusion. In English law, the marshal may stop a judicial sale upon a written notice asserting that the claim has been satisfied. Similarly, in Maltese law, if the debt is met and the auction's costs are obtained, a court registrar may discontinue a sale and return the ship to the debtor upon a verbal demand. In Dutch law, grounds to halt a sale could be: a dispute about the conditions, date, place, etc. of a judicial sale; an objection by the party who owns wholly or partly the asset, or a right that the executor must respect; or, the enforceable title is in appeal. Chinese law mandates that a sale may be stopped for illegitimacies in the sale, problems with the enforceable title, or when the executor withdraws its application.¹⁹⁵

4.3.4 Payout after the sale

Upon the conclusion of the sale, the claims on the ship are passed onto the proceeds. What is to do now is to distribute the price deposited in the court. As a general principle, the court will not make any payment until the order of the priorities of the claims competing for the proceeds is determined, with the exception that a vulnerable claimant, such as a seafarer, is involved or where the court deems it fit.¹⁹⁶

In an English sale, most times, parties agree upon the order of priorities under the well-established principles in case law and legislation. It is a scarce circumstance where the court needs to determine priorities upon a creditor's application or have a hearing. Besides, an English court generally does not remind potential claimants of distribution matters, despite the existence of a procedure concerning the advertisement inviting creditors to put in their claims and the time limit for filing competing claims. Indeed, this procedure enshrined in the statute is seldom used. Apart from one who has entered a caution regarding the person to whom the payment application by a judgment creditor will be served, other creditors might be aware of the liquidation after all the proceeds have been paid out.¹⁹⁷

¹⁹⁴ See Sections II.3.A of Paper 3.

¹⁹⁵ See Sections II.3.C of Paper 3.

¹⁹⁶ See Section II.4 of Paper 2.

¹⁹⁷ *ibid.*

In Dutch law, the liquidator appointed by the court is bound to inform all known creditors of the forthcoming distribution and invite them to put in their claims and the alleged priority. After the period for filing claims expires, the liquidator will determine the priorities of claims according to its law. Objections can be made before the time specified in the determination, and disputes shall be settled in a separate proceeding if agreements cannot be reached. After all the objections have been dealt with, the price will be distributed as per the decided order.¹⁹⁸

Maltese law requires the upcoming liquidation to be advertised in one or more periodicals or newspapers, upon the application of a competing claimant. The advertisement states how and when persons interested must put in their claims, and publishes the date on which all competing claimants must appear at trial, in which all interested persons, competing claims filed, and objections against those claims will be heard. The content of the advertisement will also be served on the person making the deposit, the executor and any other creditor at whose suit any garnishee orders have been issued. Once the decision on the competition proceeding is made, the fund will be paid out accordingly. It must be emphasised that the liquidation process may not end even after the the pay-out. In Maltese law, the fact that a party fails to file its claim on time does not bar the exercise of the right of the party. Through separate proceedings, this party can recover from the ranked creditors, the money they received, provided that the claim of the defaulting party ranks higher or equal to the ranked creditor. The default only has a bearing on the adjudication of cost.¹⁹⁹

Under Chinese law, a court must publish the time and manner in which the claims against the sale proceeds are to be registered in the court, in the advertisement and notification of sale. If the claim filed is based on a judgment, an arbitral award, or other enforceable titles, the court will recognise the claim in principle. Alternatively, the claim that has not yet been adjudicated must go through a specific proceeding for recognising the claim. After all competing claims are recognised, the court will convene a meeting where the total sum of the price, the costs of the sale, and the nature and ranking of the claims complied will be disclosed. Two possible outcomes may follow. First, agreement on priorities is reached; the fund will be divided accordingly. Second, priorities cannot be agreed upon, and the court decides the order of priorities.²⁰⁰

¹⁹⁸ *ibid.*

¹⁹⁹ *ibid.*

²⁰⁰ *ibid.*

4.3.5 The principles underlying the sale procedure and their relevance to the recognition of foreign judicial sales

Contrasting principles can be identified in six aspects of the sale proceeding, from the above findings. A part of these principles may resurface in the recognition phase, mediating the application of the private international rules governing the effects of foreign judicial sales, as shown below.

First, the varying principles concerning the ship's presence may affect the determination of a prevailing prerequisite for recognition – the jurisdiction of a foreign court. A majority of the studied legal systems concur that the ship must be kept within the territory throughout the sale, which indicates that the public authority shall assume jurisdiction over ships based on the physical *situs* of the *res*. In contrast, in Dutch law, a link between the claim and the court can substantiate a jurisdictional link; thus, a Dutch court can assert jurisdiction in relation to ships in terms of the artificial *situs*. In view of these findings, when a foreign sale in which the foreign court asserted jurisdiction based on the ship's artificial *situs* seeks recognition in legal systems, like under English, Chinese and Maltese laws, probably, the requested state will deny recognition on the ground that the foreign court is not competent.²⁰¹

Second, the contrasting principles as regards the notice before a forthcoming sale may be referred to when examining whether a lack of notice exists. It is a rule shared in common law jurisdictions that arrest is constructive notice to the world. English law, thus, only notifies cautioners of the sale. Other creditors are responsible for keeping themselves informed of the ship's status. Contrarily, in Chinese and Dutch laws, the actual notification to known creditors, such as registered mortgagees or maritime lienholders known to the sale authority, forms an indispensable part of a fair sale. Neither proper advertisement nor ship arrest can replace that. Arguably, if an English sale seeks recognition before a Dutch or Chinese court, quite possibly the sale might be denied for lack of notice. Conversely, even if notice was not given as required under Dutch or Chinese law, an English court might still recognise that sale, so long as the ship was under arrest during the sale. As identified above, an English court may regard ship arrest as constructive notice to the world.²⁰²

Third, the conflicting attitudes toward the court-approved private sale may change the strictness level in reviewing the integrity of a foreign court-approved private sale. An English court feels reluctant to approve a private sale, concerned with the possibility that judicial impartiality may be impaired. In Dutch law, court-approved private sales are also confined to the context involving a Dutch mortgage. Contrary to these two states, Malta is lenient towards private sales. Its straightforward

²⁰¹ See Section III of Paper 3.

²⁰² See Section 2.1 of this kappa.

procedure for petitioning those sales implies that the sale integrity and judicial impartiality are maintained by the chance of interested parties to be heard and the reliability of prestigious valuers. In light of these statements, presumably, the procedural proprieties in a court-approved private sale might be reviewed more critically in a legal system like English law than one similar to Maltese law.²⁰³

Fourth, as a peculiar national practice, some legal systems offer extra protection to higher-ranking claims. In turn, those states might tighten their recognition approaches to the effect that those claims could be protected in the same manner in the recognition proceedings as illustrated in the Maltese law and practice. In the payout, Malta has peculiar rules with which the liquidation process may be prolonged. Any creditor failing to file a claim within the prescribed time is not barred from obtaining payment from the proceeds. Instead, it can recover money from the ranked creditors, ranking either below or equal to the defaulting creditor. Corresponding to this extra protection, the recognition mechanism in Maltese law requires that Maltese privileges must have been given the same importance in a foreign sale as provided for under Maltese law. Otherwise, the foreign sale would be denied. Unlike Maltese law, no protection as such exists in English, Dutch and Chinese laws. Once the fund is divided according to the determined order of priorities, the liquidation process will end for good.²⁰⁴ Arguably, no extra consideration would be afforded to higher-ranking creditors in the recognition proceedings in these countries.

The remaining principles concerning two aspects of the sale also diverge substantially; however, these principles may not have a bearing on the recognition mechanism in national law.

Fifth, varying principles govern the time when a sale can be initiated. Sales *pendente lite* are a well-established common law practice, as illustrated by English law. Other legal systems, especially those from the civil law family, dictate an enforceable title for initiating a sale as an enforcement measure. The moment of initiation of a sale, *prima facie* seems to be related to the recognition condition concerning the competence of a foreign court. This competence could be either the jurisdiction of a foreign court, or a specific jurisdiction only under which ships can be disposed of, like the admiralty jurisdiction in English law. In either case, so far as the competence of the foreign court is proved, the time the sale was ordered would not be considered further.²⁰⁵

Sixth, there are disagreements underlying the principles regarding approaches to achieving the best possible price. While some states use a combination of the

²⁰³ See Section III of Paper 3.

²⁰⁴ *ibid.*

²⁰⁵ *ibid.*

minimum and appraised prices, others base their solutions on different strategies. Admittedly, issues with the price may form an objection grounded in substantial procedural irregularities. However, as shown in case law, what is considered is the amount of money. When the price is “a grossly inadequate price” lower than its “true fair market value,” the court may deny the foreign sale.²⁰⁶ Thus, how money was obtained seems irrelevant when deciding on a recognition case.²⁰⁷

As alluded to before, a uniform recognition procedure is needed to ensure the international effects of judicial sales, and this approach must avoid *révision au fond*, have a definition of finality, and set down recognition conditions. Based on the findings in this section, a further proposition is made; that is, if this approach is to be accepted universally, it may need to take into account how certain aspects of the sale, which commonly exist in national sale procedures and have significant relevance to the recognition, are governed. In other words, the approach should figure out how to accommodate contrasting principles underlying these aspects of the sale, *viz.*, the ship’s location, the notification of sale, and the variance in the standard sale, in a manner that more states would accept the approach.

4.4. Research question 4: Why the Beijing Convention is able or unable to bridge the gap between the desired legal certainty and the lack of recognition of foreign judicial sales?

In this section the adequacy of the Beijing Convention for the recognition of foreign judicial sales is examined. Two steps are taken; first, the recognition approach under the Beijing Convention is explained; second, with regard to the optimal recognition approach whether the convention approach is sufficient for recognition is discussed, and what should be done next is suggested.

4.4.1. Recognition under the Beijing Convention

Under the auspices of UNCITRAL, a new instrument, that is, the Beijing Convention, was concluded in New York, USA, in July 2022 and later in the same year, was adopted by the General Assembly of the United Nations. This convention aims to enhance certainty in the outcome of a judicial sale, by confirming the

²⁰⁶ *Bollinger & Boyd v Capt. Claude Bass* (1978) 576 F. 2d 595, 598 (US, 5th Cir). Tetley, *Maritime Liens and Claims* (n 121) 1103-1104, notes 50-51 and their accompanying text.

²⁰⁷ See Section III of Paper 3.

international effects of a judicial sale.²⁰⁸ The essential elements of the convention, including its applicability, the meaning and principle of recognition, the procedure for recognition, and the relationship with other instruments, are discussed below.²⁰⁹

The first consideration is the scope of application of the convention. Judicial sales falling within the scope of the convention must meet three criteria. First, the sale is consistent with the definition of judicial sales in the Convention. Second, the ship sold is excluded from the Convention, in terms of its type. Third, the sale can and has produced a clean title under the law of the state carrying out the sale. To be categorised as a convention judicial sale, the asset involved must be a vessel registered in a registry open to public inspection and qualified to be the subject of an arrest or other similar measure able to lead to a judicial sale under the law of the state conducting the sale. Also, the claims to be satisfied by proceeds must cover both the private and public law sections, including mortgages or *hypothèques*, maritime liens, other private law claims in connection with the ship, as well as claims of a public authority against the proceeds. The sale must be conducted by a court or other public authority, regardless of when it is ordered; the form of the sale may be a public auction or a private sale under the supervision and with the approval of a court. Ships excluded from the convention are warships and ships owned or operated by states for non-commercial governmental service. The term “clean title” refers to a sale that purges all pre-existing charges on the ship and consequently vests the ship's ownership in the purchaser free of encumbrances. The clean title is effectuated under the law of the sale state, which is also where the ship must have been located at the time of the sale. Thus, it can also be said that the clean title has been created pursuant to the *lex fori processus* or the *lex situs*.²¹⁰

The Convention applies to judicial sales ordered or approved after its entry into force in respect of the sale state, and those sales must be conducted in state parties to the convention. The time to measure the territorial connection between the sale and the forum is the time of the sale, and the ship to be sold must be physically within the territory of the state where the sale occurs. This requirement of the ship's presence is intended to ensure that there is a jurisdictional link between the public authority carrying out the sale and the ship. In view of legal divergences on when the public authority competent for sale can assert jurisdiction over ships, the convention leaves the time of sale to be determined by the law of the sale state.²¹¹

²⁰⁸ With respect to the necessity of having this Convention, case law in various national laws provides a justification, see footnotes 115 (Maltese case), 117 (Chinese case), and 128 (Dutch case).

²⁰⁹ See Section 1 of Paper 4.

²¹⁰ See Section 2.1 of Paper 4.

²¹¹ See Sections 2.2 and 2.3 of Paper 4.

The second consideration is the meaning and principle of recognition. Following the extension theory of recognition, the convention provides that a judicial sale will produce the same effects in the recognising state as in the original state. Notably, the convention does not address the effects of judgments underlying judicial sales nor the recognition of those judgments. Recognition, therefore, should not be couched in terms of the recognition and enforcement of foreign judgments. Rather, it must be understood as a type of mutual recognition bearing substantive effects. By recognition, the clean title, resulting from the sale pursuant to the law of the original state, becomes valid and can operate *erga omnes* in the recognising state. With respect to the principle of recognition, the convention model is automatic recognition. Automatic recognition does not mean that judicial sales from foreign legal systems are treated equally to domestic sales. Instead, it defers the judicial intervention to a later time when the foreign sale is relied upon. The procedure for registration that must be made before relying on the sale under the national law is dispensed with. It is also notable that foreign sales are subject to two examinations under the convention; namely, authenticity of the certificate and public policy as discussed below.²¹²

The third consideration is the procedure for recognition. The thread that ties the whole process together is the certificate of judicial sale, which plays three vital roles with regard to recognition. First, a certificate issued under the convention must meet the conditions necessary to establish its authenticity; it is the document to be produced for recognition. The issuance of certificates in the sale state is subject to four prerequisites: the completion of a sale, (ii) the sale must have conferred on the purchaser a clean title to the ship, (iii) the sale must have been carried out in accordance with the *lex fori processus*, and (iv) the sale must have been in compliance with the procedural requirements of the Convention concerning the notice of sale. The convention rules consist of three unified procedural matters, which are delivery of notice to qualified persons, announcement of notice to the public, and transmission of notice to the repository (GISIS). The convention provides a model form for the certificate. Although the sale state can use any language to fill in the form or have its own design for the certificate, certificates issued under the Convention are, to a large degree, standardised based on the information that must be included. Second, the content of a certificate constitutes sufficient evidence of the matters contained therein. Thus, the court or other authority seised should *prima facie* trust the certificate and not proceed to examine the foreign sale. Third, in the requested state, upon acceptance of the sale evidenced by a certificate, two actions may arise: (i) the registry will deregister or re-register the ship at the purchaser's or subsequent purchaser's request, and (ii) the ship can no longer be arrested for the claims arising prior to the foreign sale. Public policy is the

²¹² See Sections 4 of Paper 4.

only reason to oust the otherwise presumptive effect given to the title conferred by a foreign sale. Considering the nature of public policy, the convention takes caution to minimise the risk of abusive application of the public policy exception. To deny giving effect to a foreign sale, a court determination, which is not provisional or conditional, declaring that giving effect would be manifestly contrary to the public policy of this state, must be rendered in the requested state. A refusal of sale in the requested state must be distinguished from an avoidance or suspension of sale in the sale state. The convention provides that the sale state has exclusive jurisdiction to hear cases regarding avoiding and suspending the effects of the sale, as well as claims for challenging the issuance of the certificate. Significantly, whether non-compliance with notice requirements will lead to avoidance or suspension of a sale or certificate is for the sale state to decide. The convention itself does not govern this issue.²¹³

The fourth consideration is the relationship with other instruments. Of particular importance are two instruments concerning the international effects of judicial sales; the MLM Convention 1993 and the Judgments Convention. In light of the convergences along four matters; namely, the ship's jurisdictional link with the sale state based on its presence, a conflict of laws rule for judicial sales referring to the *lex situs*, uniform procedural requirements to effectuate the title in the original state, and a certificate evidencing the sale, it is arguable that the Beijing Convention is built on the pertinent rules of the MLM Convention, 1993. No conflict of conventions will arise when both conventions are applicable to a foreign sale. By virtue of the principle of *favour registrationis*, the Beijing Convention does not displace other instruments which provide a more favourable basis for giving effect to a foreign sale, but if the foreign sale is denied effect on grounds emanating from other instruments, the Beijing Convention must be applicable to its full extent. Since the MLM Convention, 1993 defers the recognition matters to the law of the requested state, it may be said that the Beijing Convention by the nature of automatic recognition would provide a more favourable basis for recognition and will prevail. It is the same with regard to the relationship with the Judgments Convention. Under the Judgments Convention, a foreign sale may be recognised as a judgment *in rem* or constitutive judgment. The recognition of a judgment underlying the sale is subject to various conditions set forth by the Judgments Convention.²¹⁴ Moreover, the Judgments Convention permits the application of a special procedure for the

²¹³ See Sections 3 and 4 of Paper 4.

²¹⁴ Under the Judgments Convention, a number of matters must be assessed before recognising a foreign judgment, including the connection with the state of origin (basis for recognition and enforcement), the multiple documents to be produced, the various grounds for refusal of recognition, and the application of a special procedure for the recognition and enforcement of foreign judgments as governed by the law of the recognising state. See The Judgments Convention, Articles 4-6, 12, 7, 13.

recognition and enforcement of foreign judgments as governed by the law of the recognising state.²¹⁵ Compared with automatic recognition relying on the production of certificates under the Beijing Convention, it is evident that the latter provides a more favourable basis for recognition and can thus override the former²¹⁶

In view of the above findings, it is submitted that the Beijing Convention provides a convenient and consistent approach. Not only recognition is given automatically through a straightforward procedure explicitly setting out the consequences attached to recognition, subject to only one ground for refusal based on public policy. But also, this self-explanatory procedure may be applied at large where more than one instrument concerning the international effects of judicial sales is applicable. Indeed, this convention may enhance legal certainty in the title, thereby benefiting various business interests.

4.4.2. Is it sufficient for recognition? What should be the next step?

As stated earlier, in order to better guarantee recognition, a universal approach that avoids *révision au fond*, defines the finality of a sale and establishes limited grounds for (denial of) recognition, on the one hand, and ensures equal treatment for all foreign sales and assuages registrars' burden to examine foreign laws, on the other hand, is in need. This approach had better accommodate disagreeing principles underlying certain aspects of the sale, which are common to national sale procedures and have great relevance to the recognition, in a manner that more states would accept the approach. Otherwise, the universality of the approach would be a problem. As identified above, the sale aspects concerned include the ship's location, the notification of sale, and the variance in the standard sale.

To a large degree, the proposed optimal approach and the Beijing Convention are in line with each other. A review on the merits of a sale before acceding to a recognition request is forbidden under the convention. The finality of a sale is clarified by the material scope of the convention and the prerequisite for issuing certificates: under the convention, only sales that have produced clean title under the *lex situs* are final. Moreover, the rules for registrars on what to do when facing foreign sales are self-explanatory. Examination of foreign laws where suspicious facts concerning the purchaser's title appear is a task for courts rather than registries. As for divergent principles concerning the ship's presence, the convention chooses to follow the general national practice in this regard – requiring a territorial link

²¹⁵ Discussions on the criteria for recognition under the Judgments Convention can be found in Francisco Garcimartin and Genevieve Saumier, *Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*.

²¹⁶ See Section 2.4 of Paper 4 and Section 4 of Paper 1.

between the ship and the sale state for jurisdiction purposes. The court-approved private sale is included in the conceptual scope of a convention judicial sale, enabling the convention to facilitate more types of judicial sales in national law. A court-approved private sale must be concluded under the supervision and with the approval of a court; thus, the concern in English law with regard to judicial impartiality and a fair price in a private sale may be relieved to an extent.

However, one particular issue in the convention seems to deviate from the suggested approach. The convention pays less attention to the notice rules in common law jurisdictions as represented by English law. In those states, ship arrest is deemed as constructive notice to the world and known creditors are bound to keep themselves informed of what happened to the ship. Hence, for them, uniform notice rules under the convention might be onerous. Considering greater changes to be made in their legal orders, they might regard the burden of uniform procedural requirements upon the public authority for sale as outweighing the benefit of greater legal certainty under the Convention. Accordingly, the convention might be less appealing for some common law jurisdictions. Whether a new convention will be fruitful depends on a great many factors, not the least of which is how many countries ratify the convention, and which countries ratify it.²¹⁷ If the Beijing Convention meets a hostile or indifferent reception in common law countries, its success as an international instrument would be limited. Consequently, despite its well-designed regime for recognition, it could not facilitate the recognition of foreign judicial sales, as contemplated by its promoters.

Despite the said, it must be noted that this speculative concern may turn out to be unnecessary. At least, during the preparation of this Convention, Singaporean delegates seemed receptive to national legal reforms ensuing from a new convention.²¹⁸ It may also be the case for other common law jurisdictions.

As far as this dissertation is concerned, a treaty is indeed a compromise, and every country can expect changes to be made. In view of the greater legal certainty brought by the convenient and consistent approach under the new convention, probably, the

²¹⁷ Michael F. Sturley, 'Transport Law for the Twenty-First Century: An Introduction to the Preparation, Philosophy, and Potential Impact of the Rotterdam Rules' in D Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules* (Lawtext Publishing Limited 2009) 1-33, 32.

²¹⁸ The author, as an observer, attended the sessions held by the Working Group VI of UNCITRAL for its work concerning the Beijing Convention. When discussing the notice requirements under the convention, Singaporean delegates emphasized that, each convention entailed changes to be made in municipal law and it was impossible to avoid interference with national sale procedures. Furthermore, the statement made by the Singapore delegate to the 77th General Assembly confirmed Singapore's strong support for the Beijing Convention. See <https://www.mfa.gov.sg/Overseas-Mission/New-York/Mission-Updates/Sixth_committee/2022/10/20221017> accessed 10 May 2023.

common law jurisdictions, as well as those finding the uniform procedural rules toughing, should consider tolerating the significant changes to be made, ratifying the new convention.

Notwithstanding the good wishes, very probably in the end the Beijing Convention fails to attract sufficient ratifications to be a successful international treaty. Or, it manages to be an effective treaty after obtaining three ratifications, but no other countries are interested in it. If so, this Convention with only three state parties cannot be deemed as fulfilling. In those circumstances, the multijurisdictional maritime society at least has gained feedback from the world's governments regarding what solution they would prefer in respect of judicial sales of ships, while having a well-established instrument that can serve as a basis for further discussion on this issue.

5. Conclusion

Shipping plays a crucial role in international trade and transportation. Ships, the high-value asset used in both seagoing and inland navigation, and with which commercial interests take maritime ventures, therefore shall be secured against legal risks arising from the diversity of laws. Legal certainty in ownership of the ship is desired accordingly.

What the judicial sale of ships, as an enforcement measure, tends to contribute to that desire is a title valid against everyone. As a general principle in contemporary maritime law, upon the completion of a sale, charges attaching to the ship cease to attach to the ship, passing on to the proceeds; as a corollary, the successful purchaser obtains a title to the ship good against the world. After the title is registered in a competent form, the ship can sail freely on the high seas. Only with the prospect of this sale outcome, potential bidders would offer a higher price, which in turn could benefit parties interested in the ship.

This expected outcome however may be frustrated in a multijurisdictional maritime society. As a starter of private international law, divergent legal systems of different sovereigns are on the same footing. When a foreign sale is considered, the forum is not bound to accept the effectiveness of the sale as decided in the foreign legal order. Such refusal may be in the form of the previous ship registry refusing to close the registration or through a judicial proceeding where the court invalidates the new owner's title. As illustrated by a multitude of cases worldwide, the threat of a sale being deprived of effects abroad has existed since a long time ago. Moreover, considering the increasing number of judicial sales, perhaps more sales may encounter challenges in a foreign country.

In view of legal uncertainty concerning judicial sales, efforts on a worldwide basis have been dedicated. However, a wade through the existing international regimes would suggest that the MLM Convention 1993, under which foreign judicial sales can be recognised, is insufficient for recognition, for multiple reasons. Not the least of them is that this convention does not prescribe conditions to be met for recognition. In other words, how to make a sale recognisable under the convention is insufficiently governed. Facing the coming into being of a new instrument, which is built upon existing foundations and aims to enhance legal certainty in judicial sales, this dissertation wishes to contribute to the process of enhancing legal certainty in judicial sales.

Two tasks are set: first, the obstacles to the recognition of foreign judicial sales are sought to be identified, thus providing additional knowledge which may benefit national legal orders when making decisions with regard to the solution for foreign judicial sales; second, a quest for a solution that better guarantees recognition to the advantage of the public welfare of shipping is to be made. These tasks are performed by undertaking a comparative legal research exploring similarities and dissimilarities in defined municipal and international laws governing the recognition and sale procedure.

Comparative descriptions are presented in this kappa and research papers. Then, using legal certainty in the title as the criteria of evaluation, which national recognition mechanism is better is decided. Further, based on similarities between defined legal orders, it is proposed: a universal solution that avoids *révision au fond*, provides a definition for the finality of sales, and establishes limited recognition conditions, on the one hand, and guarantees equal treatment for all foreign sales and minimises registrars' burden to examine foreign laws, on the other hand, may bring greater certainty. Besides, in the interest of universality, this solution must accommodate disagreeing principles underlying certain essential and common aspects of the sale, viz., the ship's location, the notification of sale, and the variance in the standard sale, in a manner that more states would want to accept the approach.

The proposed optimal approach is tested by comparing it to that provided for under the Beijing Convention. The convention approach could be considered convenient and consistent for two reasons: first, recognition is automatically given to foreign judicial sales, through a simple procedure featuring the use of a certificate when a foreign sale is relied on in defined contexts; second, the Beijing Convention may override other instruments where more than one instrument can be applied to recognise a foreign sale, by virtue of the principle of *favour registrationis*. A comparison of the two recognition approaches suggests that, to a large degree, they agree with each other. Nevertheless, the manner in which the convention deals with one particular aspect of the sale might limit the universality of this convention, to the extent that countries rooted in common law would find the uniform notice requirements in the convention burdensome and thus refrain from ratification. But in light of the friendly statements of Singapore delegations, this speculative concern might be unnecessary.

Despite this purported shortcoming, considering the greater legal certainty the new instrument would bring, on the one hand, and acknowledging the very nature of a treaty as a compromise, on the other, it is suggested in this dissertation that the new convention might bridge the gap between the desired legal certainty and the lack of recognition of foreign judicial sales. It should therefore be ratified. Perhaps, jurisdictions that find the uniform procedural rules unduly tough should consider tolerating the inconvenience and accept the Beijing Convention. On the other side, despite what the promoters of the Beijing Convention wish, it must be noted that that treaty may fail to attract sufficient ratifications or be a successful international

regime (with only three members). At least, some feedback can be obtained from the world's governments as to what they prefer in respect of judicial sales of ships. Furthermore, using the Beijing Convention as a basis, further discussions may be instigated.

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Appendix 1

United Nations Convention on the International Effects of Judicial Sales of Ships

The States Parties to this Convention,

Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Mindful of the crucial role of shipping in international trade and transportation, of the high economic value of ships used in both seagoing and inland navigation, and of the function of judicial sales as a means to enforce claims,

Considering that adequate legal protection for purchasers may positively impact the price realized at judicial sales of ships, to the benefit of both shipowners and creditors, including lienholders and ship financiers,

Wishing, for that purpose, to establish uniform rules that promote the dissemination of information on prospective judicial sales to interested parties and give international effects to judicial sales of ships sold free and clear of any mortgage or hypothèque and of any charge, including for ship registration purposes,

Have agreed as follows:

Article 1. Purpose

This Convention governs the international effects of a judicial sale of a ship that confers clean title on the purchaser.

Article 2. Definitions

For the purposes of this Convention:

- (a) “Judicial sale” of a ship means any sale of a ship:
 - (i) Which is ordered, approved or confirmed by a court or other public authority either by way of public auction or by private treaty carried out under the supervision and with the approval of a court; and
 - (ii) For which the proceeds of sale are made available to the creditors;
- (b) “Ship” means any ship or other vessel registered in a register that is open to public inspection that may be the subject of an arrest or other similar measure capable of leading to a judicial sale under the law of the State of judicial sale;
- (c) “Clean title” means title free and clear of any mortgage or hypothèque and of any charge;

(d) “Mortgage or hypothèque” means any mortgage or hypothèque that is effected on a ship and registered in the State in whose register of ships or equivalent register the ship is registered;

(e) “Charge” means any right whatsoever and howsoever arising which may be asserted against a ship, whether by means of arrest, attachment or otherwise, and includes a maritime lien, lien, encumbrance, right of use or right of retention but does not include a mortgage or hypothèque;

(f) “Registered charge” means any charge that is registered in the register of ships or equivalent register in which the ship is registered or in any different register in which mortgages or hypothèques are registered;

(g) “Maritime lien” means any charge that is recognized as a maritime lien or *privilege maritime* on a ship under applicable law;

(h) “Owner” of a ship means any person registered as the owner of the ship in the register of ships or equivalent register in which the ship is registered;

(i) “Purchaser” means any person to whom the ship is sold in the judicial sale;

(j) “Subsequent purchaser” means the person who purchases the ship from the purchaser named in the certificate of judicial sale referred to in article 5;

(k) “State of judicial sale” means the State in which the judicial sale of a ship is conducted.

Article 3. Scope of application

1. This Convention applies only to a judicial sale of a ship if:

(a) The judicial sale is conducted in a State Party; and

(b) The ship is physically within the territory of the State of judicial sale at the time of that sale.

2. This Convention shall not apply to warships or naval auxiliaries, or other vessels owned or operated by a State and used, immediately prior to the time of judicial sale, only on government non-commercial service.

Article 4. Notice of judicial sale

1. The judicial sale shall be conducted in accordance with the law of the State of judicial sale, which shall also provide procedures for challenging the judicial sale prior to its completion and determine the time of the sale for the purposes of this Convention.

2. Notwithstanding paragraph 1, a certificate of judicial sale under article 5 shall only be issued if a notice of judicial sale is given prior to the judicial sale of the ship in accordance with the requirements of paragraphs 3 to 7.

3. The notice of judicial sale shall be given to:

(a) The registry of ships or equivalent registry with which the ship is registered;

(b) All holders of any mortgage or *hypothèque* and of any registered charge, provided that the register in which it is registered, and any instrument required to be registered under the law of the State of registration, are open to public inspection, and that extracts from the register and copies of such instruments are obtainable from the registry;

(c) All holders of any maritime lien, provided that they have notified the court or other public authority conducting the judicial sale of the claim secured by the maritime lien in accordance with the regulations and procedures of the State of judicial sale;

(d) The owner of the ship for the time being; and

(e) If the ship is granted bareboat charter registration:

(i) The person registered as the bareboat charterer of the ship in the bareboat charter register; and

(ii) The bareboat charter registry.

4. The notice of judicial sale shall be given in accordance with the law of the State of judicial sale, and shall contain, as a minimum, the information mentioned in annex I.

5. The notice of judicial sale shall also be:

(a) Published by announcement in the press or other publication available in the State of judicial sale; and

(b) Transmitted to the repository referred to in article 11 for publication.

6. For the purpose of communicating the notice to the repository, if the notice of judicial sale is not in a working language of the repository, it shall be accompanied by a translation of the information mentioned in annex I into any such working language.

7. In determining the identity or address of any person to whom the notice of judicial sale is to be given, it is sufficient to rely on:

(a) Information set forth in the register of ships or equivalent register in which the ship is registered or in the bareboat charter register;

(b) Information set forth in the register in which the mortgage or *hypothèque* or the registered charge is registered, if different to the register of ships or equivalent register; and

(c) Information notified under paragraph 3, subparagraph (c).

Article 5. Certificate of judicial sale

1. Upon completion of a judicial sale that conferred clean title to the ship under the law of the State of judicial sale and was conducted in accordance with the requirements of that law and the requirements of this Convention, the court or other public authority that conducted the judicial sale or other competent authority of the State of judicial sale shall, in accordance with its regulations and procedures, issue a certificate of judicial sale to the purchaser.

2. The certificate of judicial sale shall be substantially in the form of the model contained in annex II and contain:

(a) A statement that the ship was sold in accordance with the requirements of the law of the State of judicial sale and the requirements of this Convention;

(b) A statement that the judicial sale has conferred clean title to the ship on the purchaser;

(c) The name of the State of judicial sale;

(d) The name, address and the contact details of the authority issuing the certificate;

(e) The name of the court or other public authority that conducted the judicial sale and the date of the sale;

(f) The name of the ship and registry of ships or equivalent registry with which the ship is registered;

(g) The IMO number of the ship or, if not available, other information capable of identifying the ship;

(h) The name and address of residence or principal place of business of the owner of the ship immediately prior to the judicial sale;

(i) The name and address of residence or principal place of business of the purchaser;

(j) The place and date of issuance of the certificate; and

(k) The signature or stamp of the authority issuing the certificate or other confirmation of authenticity of the certificate.

3. The State of judicial sale shall require the certificate of judicial sale to be transmitted promptly to the repository referred to in article 11 for publication.

4. The certificate of judicial sale and any translation thereof shall be exempt from legalization or similar formality.

5. Without prejudice to articles 9 and 10, the certificate of judicial sale shall be sufficient evidence of the matters contained therein.

6. The certificate of judicial sale may be in the form of an electronic record provided that:

(a) The information contained therein is accessible so as to be usable for subsequent reference;

(b) A reliable method is used to identify the authority issuing the certificate; and

(c) A reliable method is used to detect any alteration to the record after the time it was generated, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display.

7. A certificate of judicial sale shall not be rejected on the sole ground that it is in electronic form.

Article 6. International effects of a judicial sale

A judicial sale for which a certificate of judicial sale referred to in article 5 has been issued shall have the effect in every other State Party of conferring clean title to the ship on the purchaser.

Article 7. Action by the registry

1. At the request of the purchaser or subsequent purchaser and upon production of the certificate of judicial sale referred to in article 5, the registry or other competent authority of a State Party shall, as the case may be and in accordance with its regulations and procedures, but without prejudice to article 6:

(a) Delete from the register any mortgage or hypothèque and any registered charge attached to the ship that had been registered before completion of the judicial sale;

(b) Delete the ship from the register and issue a certificate of deletion for the purpose of new registration;

(c) Register the ship in the name of the purchaser or subsequent purchaser, provided further that the ship and the person in whose name the ship is to be registered meet the requirements of the law of the State of registration;

(d) Update the register with any other relevant particulars in the certificate of judicial sale.

2. At the request of the purchaser or subsequent purchaser and upon production of the certificate of judicial sale referred to in article 5, the registry or other competent authority of a State Party in which the ship was granted bareboat charter registration shall delete the ship from the bareboat charter register and issue a certificate of deletion.

3. If the certificate of judicial sale is not issued in an official language of the registry or other competent authority, the registry or other competent authority may request the purchaser or subsequent purchaser to produce a certified translation into such an official language.

4. The registry or other competent authority may also request the purchaser or subsequent purchaser to produce a certified copy of the certificate of judicial sale for its records.

5. Paragraphs 1 and 2 do not apply if a court in the State of the registry or of the other competent authority determines under article 10 that the effect of the judicial sale under article 6 would be manifestly contrary to the public policy of that State.

Article 8. No arrest of the ship

1. If an application is brought before a court or other judicial authority in a State Party to arrest a ship or to take any other similar measure against a ship for a claim arising prior to a judicial sale of the ship, the court or other judicial authority shall, upon production of the certificate of judicial sale referred to in article 5, dismiss the application.

2. If a ship is arrested or a similar measure is taken against a ship by order of a court or other judicial authority in a State Party for a claim arising prior to a judicial sale of the ship, the court or other judicial authority shall, upon production of the certificate of judicial sale referred to in article 5, order the release of the ship.

3. If the certificate of judicial sale is not issued in an official language of the court or other judicial authority, the court or other judicial authority may request the person producing the certificate to produce a certified translation into such an official language.

4. Paragraphs 1 and 2 do not apply if the court or other judicial authority determines that dismissing the application or ordering the release of the ship, as the case may be, would be manifestly contrary to the public policy of that State.

Article 9. Jurisdiction to avoid and suspend judicial sale

1. The courts of the State of judicial sale shall have exclusive jurisdiction to hear any claim or application to avoid a judicial sale of a ship conducted in that State that confers clean title to the ship or to suspend its effects, which shall extend to any claim or application to challenge the issuance of the certificate of judicial sale referred to in article 5.

2. The courts of a State Party shall decline jurisdiction in respect of any claim or application to avoid a judicial sale of a ship conducted in another State Party that confers clean title to the ship or to suspend its effects.

3. The State of judicial sale shall require the decision of a court that avoids or suspends the effects of a judicial sale for which a certificate has been issued in accordance with article 5, paragraph 1, to be transmitted promptly to the repository referred to in article 11 for publication.

Article 10. Circumstances in which judicial sale has no international effect

A judicial sale of a ship shall not have the effect provided in article 6 in a State Party other than the State of judicial sale if a court in the other State Party determines that the effect would be manifestly contrary to the public policy of that other State Party.

Article 11. Repository

1. The repository shall be the Secretary-General of the International Maritime Organization or an institution named by the United Nations Commission on International Trade Law.

2. Upon receipt of a notice of judicial sale transmitted under article 4, paragraph 5, certificate of judicial sale transmitted under article 5, paragraph 3, or decision transmitted under article 9, paragraph 3, the repository shall make it available to the public in a timely manner, in the form and in the language in which it is received.

3. The repository may also receive a notice of judicial sale emanating from a State that has ratified, accepted, approved or acceded to this Convention and for which the Convention has not yet entered into force and may make it available to the public.

Article 12. Communication between authorities of States Parties

1. For the purposes of this Convention, the authorities of a State Party shall be authorized to correspond directly with the authorities of any other State Party.

2. Nothing in this article shall affect the application of any international agreement on judicial assistance in respect of civil and commercial matters that may exist between States Parties.

Article 13. Relationship with other international conventions

1. Nothing in this Convention shall affect the application of the Convention on the Registration of Inland Navigation Vessels (1965) and its Protocol No. 2 concerning

Attachment and Forced Sale of Inland Navigation Vessels, including any future amendment to that convention or protocol.

2. Without prejudice to article 4, paragraph 4, as between States Parties to this Convention that are also parties to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965), the notice of judicial sale may be transmitted abroad using channels other than those provided for in that convention.

Article 14. Other bases for giving international effect

Nothing in this Convention shall preclude a State from giving effect to a judicial sale of a ship conducted in another State under any other international agreement or under applicable law.

Article 15. Matters not governed by this Convention

1. Nothing in this Convention shall affect:

- (a) The procedure for or priority in the distribution of proceeds of a judicial sale; or
- (b) Any personal claim against a person who owned or had proprietary rights in the ship prior to the judicial sale.

2. Moreover, this Convention shall not govern the effects, under applicable law, of a decision by a court exercising jurisdiction under article 9, paragraph 1.

Article 16. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 17. Signature, ratification, acceptance, approval, accession

- 1. This Convention is open for signature by all States.
- 2. This Convention is subject to ratification, acceptance or approval by the signatory States.
- 3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.
- 4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 18. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a State Party, to the extent that that organization has competence over matters governed by this Convention. For the purposes of articles 21 and 22, an instrument deposited by a regional economic integration organization shall not be counted in addition to the instruments deposited by its member States.

2. The regional economic integration organization shall make a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a “State”, “States”, “State Party” or “States Parties” in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not affect the application of rules of a regional economic integration organization, whether adopted before or after this Convention:

(a) In relation to the transmission of a notice of judicial sale between member States of such an organization; or

(b) In relation to the jurisdictional rules applicable between member States of such an organization.

Article 19. Non-unified legal systems

1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may declare that this Convention shall extend to all its territorial units or only to one or more of them.

2. Declarations under this article shall state expressly the territorial units to which this Convention extends.

3. If a State makes no declaration under paragraph 1, this Convention shall extend to all territorial units of that State.

4. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law, regulations or procedures of the State shall be construed as referring, where appropriate, to the law, regulations or procedures in force in the relevant territorial unit;

(b) Any reference to the authority of the State shall be construed as referring, where appropriate, to the authority in the relevant territorial unit.

Article 20. Procedure and effects of declarations

1. Declarations under article 18, paragraph 2, and article 19, paragraph 1, shall be made at the time of signature, ratification, acceptance, approval or accession. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Declarations and their confirmations shall be in writing and formally notified to the depositary.

3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned.

4. Any State that makes a declaration under article 18, paragraph 2, and article 19, paragraph 1, may modify or withdraw it at any time by a formal notification in writing addressed to the depositary. The modification or withdrawal shall take effect 180 days after the date of the receipt of the notification by the depositary. If the depositary receives the notification of the modification or withdrawal before entry into force of this Convention in respect of the State concerned, the modification or withdrawal shall take effect simultaneously with the entry into force of this Convention in respect of that State.

Article 21. Entry into force

1. This Convention shall enter into force 180 days after the date of the deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State 180 days after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

3. This Convention shall apply only to judicial sales ordered or approved after its entry into force in respect of the State of judicial sale.

Article 22. Amendment

1. Any State Party may propose an amendment to this Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties with a request that they indicate

whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within 120 days from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of States Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the conference. For the purposes of this paragraph, the vote of a regional economic integration organization shall not be counted.

3. An adopted amendment shall be submitted by the depositary to all States Parties for ratification, acceptance or approval.

4. An adopted amendment shall enter into force 180 days after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those States Parties that have expressed consent to be bound by it.

5. When a State Party ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that State Party 180 days after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 23. Denunciation

1. A State Party may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 365 days after the date of the receipt of the notification by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date of the receipt of the notification by the depositary. This Convention shall continue to apply to a judicial sale for which a certificate of judicial sale referred to in article 5 has been issued before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

Appendix 2:

Papers included in this dissertation

Paper 1

Towards a Harmonised Approach to the Recognition of Foreign Judicial Sales of Ships Through Conventions Addressing Maritime Liens and Mortgages

Paper 1 Yingfeng Shao and Laura Carballo Piñeiro, ‘Towards a Harmonised Approach to the Recognition of Foreign Judicial Sales of Ships Through Conventions Addressing Maritime Liens and Mortgages’ (2021) *Il Diritto Marittimo* 736.

Abstract: What to recognise in the recognition of a foreign judicial sale is the purchaser’s title obtained in that sale. However, based on the principles of state jurisdiction, there is no guarantee that the title will be recognised by a state other than the one conducting the sale. The maritime community has acknowledged the significance of this issue and repeatedly attempted to harmonise the law in this respect.

In particular, the Geneva Convention on Maritime Liens and Mortgages 1993 has strived for a consistent approach in recognising title. However, the steps taken by that convention to ensure the title are not in line with the recognition model but concentrated on the choice of law model. That choice of law approach does not favour the free circulation of title because it does not restrict the grounds for (non-)recognition abroad. Against this backdrop, a future convention, called “Beijing Draft”, proposes a new approach under which the title will be automatically recognised.

Summary: 1. Introduction. – 2. Maritime Liens and Mortgage (MLM) Conventions. – 2.1. Historical Account. – 2.2. Scope of Application. – 3. Change of Ownership via Forced Sales. – 3.1. Forced Sales and Their Effects. – 3.2. Jurisdiction for Forced Sales. – 3.3. The Law Applicable to Forced Sales. – 3.4. Notice of Forced Sales. – 3.4.1. Interplay with The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters. – 3.4.2. Notification Methods. – 3.4.3. Notice requirements: Time and Content. – 3.4.4. Who has to be notified. – 3.5. Distribution of Proceeds of Forced Sales. – 3.6. Certificates Attesting Sales. – 4. Recognition of the Purchaser’s Title

1. Introduction

Shipping goes hand in hand with the world economy, susceptible to changes in trade activities.¹ With the substantial growth of international trade in goods and services,² vessels need to sail in and out of waters of different jurisdictions and transport goods from one state to another. In this transportation process, ship-owners may fail to meet their financial obligations to crews, mortgagees,³ cargo-owners and suppliers, among others, causing their ships to be arrested by the judicial authorities of the countries in which ships call and then sold to satisfy creditors. Based on the principles of state jurisdiction, there is no guarantee that the effects of a judicial sale will be recognised by a state other than the one conducting the sale. That is to say, the transfer of property by the sale to the purchaser may be rendered ineffective abroad. For example, in the state of the ship's registration, the purchaser may not be entitled to a change of ship's registration. In other states where a challenge against the validity of the ship's title is made, this ship might be arrested, forcing the purchaser to face an otherwise unexpected claim.

This legal scenario is further complicated by the legal divergence on maritime claims across jurisdictions,⁴ which not only concerns what is a maritime claim but also its privileged nature, as well as the ranking of claims. Owing to these differences between national laws, a creditor who is not content with how his or her claim was treated in a sale carried out in jurisdiction A, may, after the original sale was effected, attempt to re-arrest the ship in jurisdiction B, as happened in the case involving the MV *Bright Star*. This vessel was sold by a Jamaican court that did not

¹ M. Stopford, *Maritime Economics*, Routledge, 2009, p. 3-45.

² J. Basedow, *The Law of Open Societies - Private Ordering and Public Regulation in the Conflict of Laws*, Brill|Nijhoff, 2015, p. 68.

³ F. Berlingieri, (eds.) *Essays on Maritime Liens and Mortgages and on Arrest of Ships: Prepared from Lectures given to an International Workshop at Dalian, People's Republic of China, October and November, 1984*, p. 71.

⁴ J. M. Alcantara, *A Short Primer on the International Convention on Maritime Liens and Mortgages, 1993 J.Mar.L.&Com.*, Vol. 27 (1996), p. 219. For a comparison of maritime liens and mortgages between the civil and common law traditions, see Berlingieri, (eds.) *Essays on Maritime Liens and Mortgages and on Arrest of Ships: Prepared from Lectures given to an International Workshop at Dalian, People's Republic of China, October and November, 1984*, cited in footnote 3, p. 24-98. For a comparison of different rankings of priorities in national laws, see W. Tetley, *Maritime Liens, Mortgages and Conflict of Laws*, University of San Francisco Maritime Law Journal, Vol. 6 (1993), p. 1.

recognise a Maltese mortgage as a maritime claim in the sale proceeding. Following the arrest of the vessel in Malta by the said mortgagee, the Court of Appeal of this country concluded that the ship had not been sold free and unencumbered in Jamaica in February 2019,⁵ contrary to what held by the Jamaican court.

Not only private claims, as illustrated above in the Maltese case, but also a claim of public character can encumber the international recognition of a purchaser's title via a judicial sale. In the Canadian case *The Norsland*,⁶ the state of the ship's registration, Panama, refused to recognise a Canadian judicial sale as free of encumbrances unless taxes arrears were paid out by the new purchaser. Consequently, the successful bidder of the judicial sale of the ship *Norsland* was obliged to pay the alleged tax arrears to the Panamanian Government to have the ship's registration closed. Following this payment, the bidder applied to the Canadian court for an order to allow subrogation of rights in its favour for the sum paid and thus participation in the proceeds of the sale, contending that the ship was not sold free of encumbrances as ordered by the Canadian court. Needless to say, the application was upheld by the Canadian court.

In both cases, the end result is that the judicial sale of the ship is deprived of its effects abroad. Scholars and practitioners have acknowledged the significance of this deprivation and repeatedly attempted to harmonise the law in this respect, in particular as regards maritime claims.⁷ The Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 1926 (the MLM Convention 1926)⁸; the Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 1967 (the MLM Convention 1967)⁹; and the Geneva Convention on Maritime Liens and Mortgages, 1993 (the MLM Convention 1993)¹⁰, provide for uniform rules on maritime liens and

⁵ For case facts, see <<https://www.mondaq.com/marine-shipping/820944/enforceability-of-a-maltese-registered-mortgage-an-update-following-the-decision-delivered-by-the-court-of-appeal-superior-jurisdiction-on-the-17th-of-june-2019>> and <<https://www.hellenicshippingnews.com/world-first-as-court-says-ships-malta-mortgage-overrides-foreign-auction/>> accessed 19 Feb.2021.

⁶ (1972) Carswell Nat 18, FC 430.

⁷ W. M. Sharpe, *Towards an International Instrument for Recognition of Judicial sales of Ships – Policy Aspects*, CMI Year Book 2013, p. 166-182.

⁸ Adopted on 10 April 1926, No. 2765. At present the convention is in force in the 24 states: Algeria, Argentina, Belgium, Brazil, Cuba, Estonia, France, Haiti, Hungary, Iran, Italy, Lebanon, Luxembourg, Madagascar, Monaco, Poland, Portugal, Romania, Spain, Switzerland, Syrian Arab Republic, Turkey, Uruguay and Zaire. Hereinafter referred to as the MLM Convention 1926.

⁹ Adopted on 27 May 1967. This convention has not entered into force.

¹⁰ Adopted on 6 May 1993, 2276 UNTS 39. At present the convention is in force in 19 states: Albania, Benin, Congo, Ecuador, Estonia, Honduras, Lithuania, Monaco, Nigeria, Peru, Russian Federation, Serbia, Spain, St Kitts and Nevis, St Vincent and the Grenadines, Syrian Arab Republic, Tunisia, Ukraine and Vanuatu.

mortgages to be recognised upon a ship, a ranking of claims, as well as provisions on the effects of a ship's forced sale in the original state and abroad.

Unfortunately, these conventions have not reached sufficient ratifications to be considered successful. Moreover, the pertinent provisions on recognition are not adequately comprehensive,¹¹ which have triggered a new attempt to address the recognition of a judicial sale that is currently under discussion. The exercise, temporarily called "the Beijing Draft", was commenced by the Comité Maritime International (CMI) in 2008 and have been under the auspices of the United Nations Commission on International Trade Law (UNCITRAL) since 2018.¹²

This paper explores the MLM Convention 1993 and the principles behind its attempt to ensure the validity of the purchaser's title against third parties regardless of the country where it is presented. If negotiations at the UNCITRAL succeed, the MLM Convention 1993 will live with a new instrument that overlaps with its provisions to a certain extent. The objective of this research is to learn the extent of this overlapping and whether they share the same approach to recognise the purchaser's title. To this end, the next section provides a brief overview of the MLM Convention 1993, followed by a discussion on the provisions that address change of ownership via forced sale. The approach for recognition laid down in the MLM Convention 1993 is discussed in section fourth, while section fifth addresses the similarities with the Beijing Draft. The paper finalises with some conclusions.

2. Maritime Liens and Mortgage (MLM) Conventions

2.1 Historical Account

Divergence among maritime security interests across countries has been in the limelight since the 19th century.¹³ The MLM Convention 1926 came into existence based on the consensus to "restrict as much as reasonably possible the number of maritime liens and the period of their validity" so that the value of the mortgage

¹¹ The following analysis of this paper will show why and to what extent these provisions are inadequate.

¹² Documents about the progression of this draft can be found on the website of the UNCITRAL: main page – working documents – Working Group VI <https://uncitral.un.org/en/working_groups/6/sale_ships> accessed on 19 Feb. 2021. The preamble of the draft convention indicates that the judicial sale of ships has been inadequately maintained as a measure and the international recognition of judicial sales concern the practitioners.

¹³ Alcantara, *A Short Primer on the International Convention on Maritime Liens and Mortgages, 1993*, cited in footnote 4, p. 219.

would be enhanced rather than being adversely affected.¹⁴ The fact that the MLM Convention 1926 had not been ratified by many important maritime countries, in particular, those belonging to the common law countries,¹⁵ and the concern as to whether mortgagees needed better protection, persuaded the CMI to consider revising it.¹⁶ The MLM Convention 1967 was the result of this effort. However, it never entered into force,¹⁷ triggering a new convention under the joint auspices of the International Maritime Organization (IMO) and the United Nations Conference on Trade and Development (UNCTAD). The MLM Convention 1993 is the outcome of this joint effort.¹⁸ Contrary to expectation, this convention has obtained fewer ratifications/accessions than its 1926 precursor.¹⁹ Since the MLM Convention 1967 is not in force, and its contents were further developed by the MLM Convention 1993, and the MLM Convention 1926, though providing for sales, containing no provisions respecting the recognition of sales, this paper only addresses the 1993 convention. Nonetheless, it is conspicuous that the primary objective behind these conventions is consistent, which is to facilitate ship financing through uniform rules on maritime securities.

During the consideration of the revision of the MLM Convention 1967, a consensus was reached by the CMI regarding the main features of a satisfactory security.²⁰ It was emphasised that a sale at a market price constituted a vital feature of a satisfactory security, and in order to achieve such a price, it was of the essence to furnish the purchaser with a valid ship's title enforceable against the world.²¹

¹⁴ F. Berlingieri, *International Maritime Conventions (Volume 2): Navigation, Securities, Limitation of Liability and Jurisdiction*, Taylor & Francis, 2014, p. 132.

¹⁵ *Ibid.*, p. 163.

¹⁶ *Ibid.*, p. 163.

¹⁷ *Ibid.*, p. 162.

¹⁸ A joint working group of experts on maritime liens and mortgages was convened by these two organizations, according to the recommendation of the IMO and the resolution of the UNCTAD, see *Ibid.*, p. 163-164.

¹⁹ *Ibid.*, p. 164.

²⁰ *Ibid.*, p. 166.

²¹ CMI, *1985 Lisboa I*, p. 46, the original text is as follows:

...[T]he essential features of a satisfactory security are: i) the possibility of enforcement wherever the vessel may be found, and to this effect the security must be recognized in as many countries as possible through an international convention; ii) the possibility of sale of the vessel at the market price, and to this effect it is necessary to offer the protective buyer a valid title wherever the ship may go after the forced sale; iii) the possibility of recovering the outstanding portion of the loan from the proceeds of the forced sale, and to this effect the claim of the lender must be granted highest possible priority.

Bearing this in mind, detailed rules on forced sales were contemplated and later included in the MLM Convention 1993.

2.2 Scope of Application

The scope of application of the MLM Convention 1993 is limited on different levels: a provision that is based on the ship's characteristics positively identifies the scope,²² followed by a provision that lists out the types of ships that are excluded from the application,²³ as well as a provision of the subordination of this convention to other conventions governing limitation of liability.²⁴ The first two decide what ships and hence their subsequent sales can apply the convention; thus, they are analysed below. Whereas, though a limitation fund and its distribution may affect how to enforce certain maritime claims, they are irrelevant to judicial sales. The last one is therefore not addressed here.

The notion of ship, to which the convention applies, is considered with reference to (i) waters in which the ship is sailing or intended to sail, (ii) registration, (iii) physical location of the ship. The term used to identify the application scope is "seagoing vessels". Lacking a definition for "seagoing", the reference to "seagoing vessels" may be read to cover both the ships that are intended to sail at sea and registered as such, and those, whatever registered, subject to their compliance with safety rules, that sail at sea at the relevant time.²⁵ Besides being seagoing, a ship must be registered in a state. The state in whose registry a ship is entered decides the nationality of the ship, and this ship flies the flag of that state.²⁶ A temporary change of flag, based on a bareboat charter, is excluded from the notion of registration under the MLM Convention 1993²⁷ and accordingly irrelevant.

A distinction is made between the ships registered in a state party and those registered in a state that is not a state party. The convention applies to the former ones insofar as requirements (i) and (ii) are met, wherever the ships physically are. Whereas, to the latter ones, only if the ships are subject to the jurisdiction of a state

²² The MLM Convention 1993, art.13(1).

²³ The MLM Convention 1993, art.13(2).

²⁴ The MLM Convention 1993, art.15.

²⁵ Berlingieri, *International Maritime Conventions (Volume 2): Navigation, Securities, Limitation of Liability and Jurisdiction*, cited in footnote 14, p. 166.

²⁶ F. Berlingieri, *Berlingieri on Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Conventions*, Informa, 2011, para. 20.23.

²⁷ The MLM Convention 1993, art.16(a).

party,²⁸ the convention becomes applicable. This notion of jurisdiction relates to the territorial jurisdiction of a coastal state. According to the civil jurisdiction in relation to foreign ships that is prescribed in the United Nations Convention on the Law of the Sea (UNCLOS),²⁹ a coastal state has jurisdiction when a foreign ship, of a nationality other than that of the coastal state, is in its territorial waters.³⁰

To be more accurate,³¹ for any civil proceeding, the foreign ship must be either lying in the territorial sea, or passing through the territorial sea after leaving internal waters, such as ports. Plus, for obligations and liabilities assumed or incurred by the ship in or for the voyage through the territorial sea, such as a collision, it is sufficient that the ship is in the territorial waters.³² Thus, if a foreign ship registered in a non-party state does not stop in the territorial sea of a state party or enter into its ports, just sailing through the territorial sea, it might not be subject to the jurisdiction of this state.³³

The convention excludes ships owned or operated by a state and used on governmental non-commercial service from its scope.³⁴ This exclusion rule is similar to the exemption rule in the Immunity of State-owned Vessels Convention,³⁵ with a substantial reduction on the types of the ship entitled to exemption.

²⁸ The MLM Convention 1993, art.13(1).

²⁹ The United Nations Convention on the Law of the Sea (UNCLOS), 1833 UNTS 3, art.28.

³⁰ Berlingieri, *Berlingieri on Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Conventions*, cited in footnote 26, para. 13.14, though the analysis of the coastal state's jurisdiction is made regarding the arrest conventions, given that the subject matter in relation to which the jurisdiction is considered is the same, *i.e.*, a foreign ship, the analysis on the arrest conventions is extended to the discussion here with respect to the MLM Convention 1993. See also *Id.*, *International Maritime Conventions (Volume 2): Navigation, Securities, Limitation of Liability and Jurisdiction*, cited in footnote 14, p. 165.

³¹ UNCLOS, art.28(2)&(3).

³² Berlingieri, *Berlingieri on Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Conventions*, cited in footnote 26, para. 13.14.

³³ *Ibid.*, para. 13.15.

³⁴ The MLM Convention 1993, art.13(2).

³⁵ International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels, signed at Brussels, April 10 1926, and Additional Protocol, signed at Brussels, May 24 1934, 176 LNTS 199, art.3.

3. Change of Ownership via Forced Sales

3.1 Forced Sales and Their Effects

In addition to maritime liens and mortgages, the MLM Convention 1993 contains provisions on forced sales and their legal effects for the reasons above explained, i.e., in order to secure the purchaser's title over the ship and thus increasing the chances to get the best price for the ship.

The term “forced sale” is used to refer to the notion of judicial sale. In general, judicial sales of ships are a procedural measure conducted with the involvement of a public authority, usually a court,³⁶ to meet unsatisfied private law claims relating to the ships or against the ship-owners, i.e., maritime claims.³⁷ A commonplace scenario is that a creditor of the ship-owner, such as a mortgagee of the ship, suffers payment default and brings a claim, which is subsequently supported by the court, in the jurisdiction in which the ship has been or is to be arrested. If the ship-owner fails to meet the judgment debt, the mortgagee is entitled to apply to the court for a sale of this ship, usually, but not always, through a public auction process.³⁸ After the sale is complete, there is a distribution process in which all claims relating to the ship or against the ship-owner are paid out of the sale proceeds, in accordance with the ranking of priorities among the claims in accordance with the relevant applicable law. If any residue remains after the distribution, it is returned to the ship-owner.³⁹

Absent a definition for “forced sale”, in light of the rationale of the MLM Convention 1993, “forced sale” consists in a sale that is carried out for enforcing maritime claims, with the involvement of a public authority, guaranteeing the

³⁶ A public notary can also be in charge of and conduct a judicial sale in some national laws, such as the Netherlands.

³⁷ In criminal or administrative proceedings, sales can also be initiated and conducted to serve certain functions, under national laws, such as preventing the commission of crimes or preserving evidence in criminal proceedings in criminal proceedings, or demanding due taxes or fees in administrative proceedings. See F. Berlingieri, *Synopsis of the Replies from the Maritime Law Associations of Argentina, Australia, Belgium, Brazil, Canada, China, Croatia, Denmark, Dominican Republic, France, Germany, Italy, Japan, Malta, Nigeria, Norway, Singapore, Slovenia, South Africa, Spain, Sweden, America, Venezuela to the Questionnaire in Respect of Recognition of Foreign Judicial Sales of Ships*, CMI Year Book 2010, p. 247-384.

³⁸ S. Hetherington, *The Malta Colloquium on Recognition of Judicial Sale of Ships: Valletta, 27 February 2018*

< <https://comitemaritime.org/wp-content/uploads/2018/05/Hetherington-presentation-at-Colloquium-on-Recognition-of-Judicial-Sale-of-Ships-Valletta-Malta-270218-003.pdf> > accessed 29 March 2021

³⁹ For detailed accounts of the procedure of judicial sales, see L. Bleyen, *Judicial Sales of Ships: A Comparative Study*, Springer, 2016.

possibility of satisfying the maritime securities contained in the convention. This, however, does not mean that “forced sale” must be initiated for enforcing a convention claim. In practice, maritime claims not covered by the convention, for instance, a claim arising from materials supplied to a ship, can also lead to a judicial sale wherein the proceeds will be distributed to the holders of convention-governed securities. Besides, a sale that is ordered in a criminal or administrative proceeding but carries the private law character also falls within the conceptual scope of “forced sale”. For example, in the criminal proceeding for a traffic casualty at sea, the court may order to sell the ship to compensate the victim, with a sale procedure similar to that in the civil proceeding for a maritime claim in respect of loss of life. Dealing with private law matters regardless of the nature of the proceeding is not unusual in uniform law conventions, as illustrated by the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the Brussels Ibis Regulation) that applies in civil and commercial matters whatever the nature of the court or tribunal.⁴⁰ The MLM Convention, though not providing an express provision to this effect, does not prohibit such an approach. If a unification of law towards secured maritime claims is pursued, it seems not to make sense to treat these claims differently depending on the nature of the proceeding wherein these claims are dealt with. It is, therefore, reasonable to include into the notion of forced sale these types of judicial sales out of whose proceeds private law claims are to be satisfied. That said, as correctly stated by a commentator, “uniformity of interpretation has not always followed uniformity of enactment”.⁴¹ Diverging interpretations by national courts horizontally cannot be avoided.

The effects of a forced sale in the MLM Convention derive from two provisions: in terms of Article 3, the ownership on the ship is transferred to a purchaser, regardless of the existing ship’s registration that certifies the owner and creditors of this ship otherwise,⁴² and, according to Article 12(1), all encumbrances prior to the sale shall cease to attach to the ship.⁴³ Combining them, a forced sale, which has been concluded in accordance with the convention, produces a legal consequence as to transfer the ship’s ownership free from encumbrances to the purchaser, through

⁴⁰ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJL 351/1.

⁴¹ M. F. Sturley, *International Uniform Law in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, Virginia Journal of International Law, Vol. 27 (1989), p. 729.

⁴² The MLM Convention 1993, art.3.

⁴³ The MLM Convention 1993, art.12(1). Except for the said, there is a possibility that the purchaser assumes some charges with the consent of the holders.

which the purchaser obtains a clean title. Suffice it to mention, property laws in jurisdictions differ greatly on whether the actual delivery of an asset is necessary for transferring the ownership of the asset.⁴⁴ For ships under the convention, the question about delivery is to be answered by the law of the state conducting the sale, as will be stated later.⁴⁵

Except for a substantive rule on the sale's effects, the MLM Convention also lays down procedural rules which set standards to be complied with in concluding a forced sale, as well as a conflict rule for a forced sale. These rules address the jurisdiction for and the law applicable to a forced sale, provide standards on notice and distribution, and establish a certificate attesting the property change via the sale, as analysed below.

3.2 Jurisdiction for Forced Sales

In the MLM Convention, the ship to be sold must be “in the area of the jurisdiction of the state conducting the sale at the time of the sale”,⁴⁶ *i.e.*, the country having power for the forced sale is that in whose jurisdictional area the ship physically situates. The reference to “in the area of the jurisdiction” in this rule is similar to the phrase “subject to the jurisdiction” in the scope of application clause, as both depend on the concept of jurisdiction in relation to ships.

In light of the notion of civil jurisdiction concerning foreign ships in UNCLOS, as above explained, a coastal state within whose territorial waters the ship physically is has jurisdiction to carry out a forced sale of the ship. No question will arise. Domestic ships, however, might give rise to a problem. Other than territorial jurisdiction, flag states may assert extraterritorial jurisdiction for ships of their nationalities on the high seas.⁴⁷ In fact, certain national legal systems do allow a domestic ship to be sold for enforcing a domestic mortgage while the ship does not locate within the territory of that state; namely, the ship can be sold without being priorly arrested.⁴⁸ Does “in the area of jurisdiction” allow a flag state, asserting extraterritorial jurisdiction upon any of its ships sailing on the high seas, to sell the ship without a prior arrest? At least, from the current text, the possibility of

⁴⁴ Divergences on property laws between jurisdictions, see W. Ding, *Private International Law*, Shanghai People Publish, 2009.

⁴⁵ See section 3.3, the law applicable to forced sales.

⁴⁶ The MLM Convention 1993, art.12(1)(a).

⁴⁷ UNCLOS, art.92. See also UNCITRAL, A/CN.9/1047/Rev.1, para 25.

⁴⁸ For example, Dutch law, see W. Jarigsmma, *the Netherlands*, Maritime Law Handbook, London, 1998, p. 3. Note that if the flag state is a party to the Arrest Convention, the domestic ship cannot be sold, provided that a security has been paid to the authority of the sale in exchange of releasing the ship.

interpreting this expression as such is not ruled out. Anyhow, a coastal state principally has jurisdiction for a forced sale of a ship situated within its territory. “The time of the sale” constitutes part of the jurisdiction rule, namely, the exact time to decide whether jurisdiction can be asserted. Lacking an autonomous definition in the convention, “the time of the sale” needs to be construed under the law of the state asserting jurisdiction.

3.3 The Law Applicable to Forced Sales

After asserting jurisdiction for a forced sale, the applicable law for concluding this forced sale has to be determined. In general, concluding this forced sale comprises three stages: requirements to be met to initiate the sale, preparations to be made for the sale, and the sale itself.⁴⁹ Each part consists of several matters. The MLM Convention provides a uniform conflict rule that designates the law of the state conducting the sale as the applicable law for concluding the sale.⁵⁰ Except for the matters prescribed in the convention, the remaining matters must be subject to the law of the state conducting the sale (the *lex fori processus*).⁵¹

Before exploring the matters decided in the *lex fori processus*, those governed in the convention must first be identified. First and foremost, there is an autonomous concept for forced sales in the convention. Whether the sale at question constitutes a forced sale is determined by the convention. Second, the convention lays down a jurisdiction rule for forced sales. Third, the legal effects of a forced sale concerning the change of property are provided by the convention as well. Fourth, two procedural matters in concluding a forced sale, being notice of forced sale and distribution of proceeds, are governed by uniform convention rules, as will be stated later.⁵²

Besides the matters contained in the convention, all of the other matters in relation to the conclusion of a forced sale are decided by the *lex fori processus*. In the initiation stage, the *lex fori processus* decides: what assets constitute a ship, is there a standing to initiate a forced sale, and whether the ship has to be under arrest. In the preparation stage, the public authority appointed by the *lex fori processus* for

⁴⁹ Bleyen, *Judicial Sales of Ships: A Comparative Study*, cited in footnote 39, describes in detail the sale procedure in three countries: the UK, Belgium and the Netherlands. In general, they all consist of these three stages.

⁵⁰ The MLM Convention 1993, art.12(1)(b).

⁵¹ The applicable law is subordinate to the convention law, provided that the matter concerned is governed in the convention. Namely, whatever is governed by uniform substantive rules is no longer subject to national law. See L. C. Piñero, *IMO*, *Encyclopedia of Private International Law*, p. 910.

⁵² See section 3.4 and 3.5 of this paper.

carrying out the forced sale is in charge of advertising the sale, valuation, setting forth the conditions of sale, registration of claims, and dealing with oppositions against the sale. In light of the actual sale, the form of the sale is determined per the *lex fori processus*, *i.e.*, whether the sale takes the form of a public auction or a private treaty.⁵³ The technicalities of forced sales vary greatly between national laws. For example, one country may encourage a forced sale to be advertised and concluded in an online platform while another probably finds the online sale mode undesirable at all and prohibits it.⁵⁴ Adding to the said, any procedural incidents channelling the discussion as to the ranking of claims or, where appropriate, ship ownership, are also subject to the *lex fori processus*.

The survey first shows that matters not covered in the convention outnumbers those covered. Apparently, the MLM Convention is aware of the divergences in the procedural law for forced sales between states and intends to respect these differences. Meanwhile, it provides for minimum standards for two essential procedural matters – notice and distribution of the sale proceeds. The latter is of the essence in order to inform all interested creditors and third parties of the forced sale, for them to exercise their rights on time.

Secondly, the convention’s conflict rules establish a relationship between the forum and *ius* that might be a version of *lex situs*.⁵⁵ After a forum state asserts jurisdiction for a forced sale, this forum is entitled to apply its own law to effect this sale. There is no need to look to foreign laws unfamiliar to the forum, in particular the law of the country where the ship is registered. Given that the forum state is the same as that within whose jurisdiction the ship physically is situated at the time of the sale,⁵⁶ it can be said that the law of the country where the ship is situated at the time of the sale, *i.e.*, the *lex situs*, governs the property matters of the ship.

⁵³ A private sale to a particular person, instead of open to public, is also allowed in some jurisdictions. For example, Chinese law, see the Chinese Supreme Court’s Regulations on the Law Applicable to Issues of Ship Arrest and Auction, arts.13 &14; Singapore law, see P. Myburgh, ‘Satisfactory for its Own Purposes’: *Private Direct Arrangements and Judicial Vessel Sales*, *Journal of International Maritime Law*, Vol. 22 (2016), p. 355.

⁵⁴ E. C. Jiankai, *Judicial Sale of Arrested Vessels: The Suitability of Taobao as a Platform for Singapore Judicial Sale*, *SAC LJ*, Vol. 31 (2019), p. 72. Taobao is used as a prevalent sale platform in Chinese law, but the author from Singapore law background does not think the online model of ship sales shall be copied in Singapore.

⁵⁵ In private international law, *Lex situs* refers to the law of the jurisdiction where a movable is and it is principally the law governing property matters of the movable.

⁵⁶ The MLM Convention 1993, art.12(1)(a).

3.4 Notice of Forced Sales

3.4.1 Interplay with *The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*

The notice rules in the MLM Convention envisage the service of a document about a coming sale to a number of persons therein detailed and whose participation/knowledge is deemed critical to ensure the legal effects of the forced sale, both domestically and abroad.⁵⁷ Nevertheless, it is to note that the service of a document may also be subject to another international convention, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Service Convention).⁵⁸ The Service Convention applies when a judicial or extrajudicial document in civil or commercial matters is to be transmitted from one state party to another for service in the latter provided an address for the person to be served is known.⁵⁹ Service is interpreted by the Hague Conference on Private International Law (HCCH) as delivery of judicial or extrajudicial documents to the addressee.⁶⁰ Therefore, giving notice in the MLM Convention falls within the definition of service.

“Civil or commercial matters” are not defined in the Service Convention. When determining the character of a forced sale, it was suggested that a forced sale would take the character of the proceedings giving rise to it.⁶¹ A forced sale is initiated for enforcing maritime claims. In defining the scope of the Convention of 30 June 2005 on Choice of Court Agreements (the Choice of Court Agreements Convention),⁶² the same expression “civil or commercial matters” is construed to include maritime claims.⁶³ Though caution shall be taken in importing the definition of a term from one convention to another, the teleologies of the Service Convention at least do not

⁵⁷ The MLM Convention 1993, art.11(3).

⁵⁸ Adopted on 15 November 1965, 658 UNTS 163, currently in force in 78 states.

⁵⁹ These applicability requirements regarding the sphere of application of the Service Convention, can be found in its Article 1. For a detailed discussion in this respect, see HCCH, *The Practical Handbook on the Operation of the Service Convention*, 2016, p. XLV. This handbook is designed, based on a consensus between contracting states recognising the need to have such a document, to assist the users with the operation of the transmission channels and the protection of the defendant, as well as to facilitate the national court when interpreting the Service convention by providing decisions rendered by other contracting states. Hereinafter this book is referred to as the Handbook on Service.

⁶⁰ The Handbook on Service, para.23.

⁶¹ UNCITRAL, A/CN.9/WG.VI/WP.85, para. 18.

⁶² Adopted 30 June 2005, No.53483, art.2(2)(b).

⁶³ T. Hartley – M. Dogauchi, *Explanatory Report*, para. 49,59.
<<https://assets.hcch.net/upload/exp137final.pdf>> accessed 23 May 2021.

suggest a narrower meaning for that term.⁶⁴ Thus, a forced sale constitutes a civil or commercial matter, and hence the Service Convention applies to the service of sale notice abroad.

The compatibility of these conventions is dealt with by Article 25 of the Service Convention, whereby the Service Convention is not allowed to derogate from conventions to which the state parties are or will be parties, insofar as these conventions contain provisions relating to matters governed by the Service Convention.⁶⁵ Given that Article 25 takes account of both existing and future bilateral and multilateral agreements, the MLM Convention takes precedence over the Service Convention in the application.

Despite the precedence, in fact, the Service Convention can supplement the MLM Convention. In giving notice, the MLM Convention permits its state parties to use alternative means other than the means expressly provided therein.⁶⁶ The alternative means has to be appropriate and can provide a confirmation of receipt. On the basis that the channels in the Service Convention are undeniably appropriate and always provides reports regarding whether the service was completed abroad, those channels can be drawn upon by the MLM Convention.⁶⁷ In the following section, in what respects one convention supplements the other is explained.

That said, like the MLM Convention, the Service Convention allows its state parties to deviate from its expressly governed channels. Derogatory channels consisting of those provided in international treaties and those provided by the domestic law of the state of destination, are allowed.⁶⁸ The validity of service through derogatory channels, however, is not secured under the Service Convention. Those channels thus shall not be looked to if the authority for sale wants to rely on the Service Convention to secure the service of notice.

⁶⁴ UNCITRAL, A/CN.9/WG.VI/WP.85, para. 20.

⁶⁵ Compare it with the Convention for the Unification of Certain Rules for International Carriage by Air (309 UNTS 2242), which follows an opposite approach that requires this convention to prevail over all other conventions on air carriage (art.55). For more methods in dealing with the conflicts between conventions on transportation, see L. Ming, *Conflicts between Rotterdam Rules and Relative Conventions on International Carriage of Goods and Its Solutions*, East China University of Political Science and Law, 2010.

⁶⁶ The MLM Convention 1993, art.11(3).

⁶⁷ As to how each channel works, see the Handbook on Service.

⁶⁸ The Handbook on Service, XLVI.

3.4.2 Notification Methods

As above stated, the MLM Convention can be supplemented by the Service Convention in certain respects. Bearing this in mind, a survey of the methods for serving notice under those two conventions is made.

The MLM Convention provides for three methods for service: (i) the written notice is given by registered mail, (ii) the written notice is given by any electronic means providing confirmation of receipt, or (iii) the written notice is given by other appropriate means providing confirmation of receipt.⁶⁹ Whether the method used in practice is one of those must be decided autonomously within the convention. Given that the rules for methods lack details and there is no supranational interpretation for the MLM Convention, a dispute over the appropriateness of the method may arise between states. For example, does registered mail cover private courier services? Does an automatic reply from the recipient's email server count for a confirmation of receipt? Is leaving a message on the Facebook page of the addressee appropriate? These questions may give rise to legal divergence.

In the Service Convention, there are one main channel and several alternative channels.⁷⁰ Each channel constitutes a method for service. Under the main channel,⁷¹ the authority of the requesting state transmits documents to be served to the central authority of the requested state.⁷² Alternative channels⁷³ comprise (i) the consular or diplomatic channels,⁷⁴ (ii) postal channels,⁷⁵ (iii) direct communication between judicial officers, officials or other competent persons of the requesting state and the requested state,⁷⁶ and (v) direct communication between an interested party and judicial officers, officials or other competent persons of the requested state.⁷⁷ There is no hierarchy or differences in importance among these channels,⁷⁸ and every channel has its own criteria to meet for valid service. Plus, the advice from

⁶⁹ The MLM Convention 1993, art.11(3).

⁷⁰ The Handbook on Service, XLVI.

⁷¹ The Service Convention, art.2.

⁷² The Handbook on Service, XLVI. A model form informing the result of service must be used.

⁷³ The Handbook on Service, L. Caution shall be exercised in applying one specific alternative channel, as it can be used only if the requested state has not objected to it.

⁷⁴ The Service Convention, arts.8(1) and 9.

⁷⁵ The Service Convention, art.10(a).

⁷⁶ The Service Convention, art.10(b).

⁷⁷ The Service Convention, art.10(c); The Handbook on Service, LI. As to the meaning of direct communication, the HCCH holds that the documents shall be served by one *huissier de justice* to another.

⁷⁸ The Handbook on Service, XLVI.

the HCCH and the experience of state parties in exercising this convention are available to facilitate the interpretation of channels.⁷⁹ Comparing with the MLM Convention, the Service Convention seems to better secure the service of notice, avoiding legal divergence regarding the appropriateness of method, as above mentioned.

What needs attention, in particular, is postal channels, which in some respects are similar to methods in the MLM Convention.⁸⁰ Regarding the specific means for service, postal channels certainly cover sending documents by registered deliveries, including postal services and private courier services.⁸¹ However, whether transmission by electronic means falls within postal channels is controversial.⁸² The prevalent view is that certain information technologies, such as emails that are sent by postal agencies,⁸³ can be subsumed under postal channels.⁸⁴ In contrast, normal email services are not permitted.⁸⁵

Besides the serving of notice to individuals, a press announcement or other form of publications shall be made in the state where the sale is conducted, under the MLM Convention. This rule is similar to the notification methods used in civil law countries, the laws of which usually require both an advertisement of the sale, together with sending sale notice to relevant persons.⁸⁶ The procedure in common law jurisdictions is also identical. The court in charge of the sale would make an advertisement to invite creditors to file their claims. And, persons who have filed

⁷⁹ As shown by the Handbook on Service.

⁸⁰ Provided that two criteria of the validity of service are met: the law of the requesting state is met for valid service by mail; and, the requested state has not objected to this method. See the Handbook on Service, para 26.

⁸¹ The Handbook on Service, para 252-254.

⁸² *Annex 8: The Use of Information Technology in the Operation of the Service Convention*, the Handbook on Service, para.4. Hereinafter referred to as Annex 8 in the Handbook on Service.

⁸³ There are other electronic means that have the potential to be used to serve documents. Such as Facebook, Twitter and online message board. But, the HCCH does not offer an opinion on whether article 10(a) shall be interpreted to cover these means. Annex 8 in the Handbook on Service, para 95.

⁸⁴ With the help of a “functional equivalence” approach. See Y. A. Tamayo, *Catch Me If You Can: Serving United States Process on an Elusive Defendant Abroad*, Harv. J. L & Tech., Vol. 17 (2003), p. 211; D. P. Stewart - A. Conley, *E-mail Service on Foreign Defendants: Time for an International Approach*, Geo.J.Int'l L., Vol. 38 (2007), p. 755.

⁸⁵ The reason for such delimitation, partly arises out of the concern over security requirements of the technique, and partly is based on the consideration that only emails sent by postal agencies carry the “postal” character entailed by article 10(a). See Annex 8 in the Handbook on Service, para 35.

⁸⁶ For example, Belgium and the Netherlands, see Bleyen, *Judicial Sales of Ships: A Comparative Study*, cited in footnote 39. Besides, though rooted in a different legal tradition of Asia, Chinese law also requires so, the Chinese Maritime Special Procedure Law, art.32.

cautions against release before the sale is ordered will be notified of the application of sale.⁸⁷

3.4.3 Notice requirements: Time and Content

If the actual time and place have been decided by the sale authority when the notice is to be given, the notice shall be provided at least 30-days before the sale.⁸⁸ If not, except for an ordinary notice, an additional notice of the finalised time and place shall be given seven days prior to the actual sale.⁸⁹

In deciding the content of the notice, the convention provides general guidance for the state conducting the sale. The particulars must be sufficient to protect the interests of persons entitled to notice.⁹⁰ As suggested, certain particulars, including the timeframe within which to file claims for distribution, how these claims shall be filed, and the form by which the sale is carried out, have to be clarified in the notice.⁹¹

The MLM Convention does not address the language issues regarding the sale notice. Two situations may come up. If the notice is served under the Service Convention, then depending on which channel is used, the notice may be required for translation under the main channel,⁹² or it may not need to be translated under alternative channels.⁹³ On the other hand, if the Service Convention has not been applied, following the rationale that the sale process is to be completed in accordance with the applicable law, this issue is to be decided by the *lex fori processus*.

⁸⁷ For example, the UK, see N. Meeson – J. Kimbell, *Admiralty Jurisdiction and Practice*, Informa Law from Routledge, 2017, para. 4.93-4.94.

⁸⁸ The MLM Convention 1993, art.11(2).

⁸⁹ The MLM Convention 1993, art.11(2).

⁹⁰ The MLM Convention 1993, art.11(2).

⁹¹ Berlingieri, *International Maritime Conventions (Volume 2): Navigation, Securities, Limitation of Liability and Jurisdiction*, cited in footnote 14, p. 186.

⁹² The Handbook on Service, XLVIII.

⁹³ The Handbook on Service, LI.

3.4.4 *Who has to be notified*

In the MLM convention, persons who must be notified comprise the ship registry,⁹⁴ the registered ship-owner,⁹⁵ the holders of registered securities,⁹⁶ and the maritime lienors known to the authority for the sale.⁹⁷

The registry refers to both the registry of the ship's nationality and the authority in charge of the ship's record in the state whose flag the ship is permitted to fly temporarily.⁹⁸ The ship-owner is the owner recorded in the registry rather than a beneficial owner.

The holders of registered securities are only those whose securities have not been issued to bearers. Suffice it to mention, given that sale notice is only provided to the persons interested and known,⁹⁹ the convention seems to indicate that if one specific person, among the previous-mentioned, cannot be identified by reasonable ways, the obligation of notifying that person may be exempted. A possible example is that the security or the ship's ownership is registered in a private register that is not open to the public.

Contrary to the aforementioned holders of registered securities, those of maritime liens and those of registered securities issued to bearers, shall be notified, only if the authority for the sale receives notice of their claims. The convention does not explain how those creditors become aware that there is a sale ongoing. In practice, there are four possible ways through which the authority can receive notice of claims.

First, the creditor is the debtor arresting the ship.¹⁰⁰ Second, the creditors know there is a sale from the advertisement (publication), and then file their claims to the authority. In case more than one notice needs to be sent for the sale, for instance, the first sale fails, those creditors consequently become entitled to the subsequent sale notice. Thirdly, in the stage of trial, certain creditors may have known that the ship related to their claims will be sold later, and they hence lodge caution against

⁹⁴ The MLM Convention 1993, art.11(1)(a).

⁹⁵ The MLM Convention 1993, art.11(1)(d).

⁹⁶ If the registration record has been issued to bearer, the mortgage must be filed to the authority conducting the sale. The MLM Convention 1993, art.11(1)(b)&(c).

⁹⁷ The MLM Convention 1993, art.11(1)(c).

⁹⁸ The MLM Convention 1993, art.16(e).

⁹⁹ The MLM Convention 1993, art.11(3).

¹⁰⁰ For example, in Belgium law, the Belgian Code of Civil Procedure, art. 1551; in Chinese law, the Chinese Maritime Special Procedure Law, art.33.

release.¹⁰¹ Fourthly, according to the *lex fori processus*, the authority is obliged to investigate the maritime claims attached to the ship *ex officio*, or, the arrestor is responsible for submitting a list of claims together with other documents to the authority.¹⁰² Those ways may be used alternatively or collectively.

Other maritime liens under national laws,¹⁰³ as well as claims not mentioned in the convention, are not entitled to individual notice. Be that as it may, it is to acknowledge that the convention actually also secures the fundamental procedural rights of being notified for these claims. As a matter of fact, the press announcement required in the convention seeks to reach all creditors, namely, creditors of whatever claims that might be satisfied out of the proceeds, regardless of whether governed or not in the convention, or whatever nature they are. Any creditor who has been aware of the notice through press announcement can apply for participating in the sale, thereby protecting his or her legitimate interests. More importantly, other creditors may actually be notified individually, if the *lex fori processus* requires as such. For instance, an oil supplier may file a caution against release on the ground of default payment, before the forced sale of ship is decreed, and hence become entitled to individual notice under the applicable law. Differences in methods of notification between convention claims and others not governed therein perhaps, on the one hand, are requested by the expediency of sale, while on the other hand, owing to the importance accorded by the convention to certain maritime claims. Anyhow, the convention can be read to secure the right of being notified for all creditors entitled to participate in the sale. In case the authority of the sale has already made an appropriate sale announcement, creditors concerned in this paragraph may not be able to contest later the integrity of the sale on the ground of lack of notification.

3.5 Distribution of Proceeds of Forced Sales

In order to ensure that the sale is made free from encumbrances, a sale's proceeds must be distributed between creditors in the order of priority established by the MLM Convention.¹⁰⁴ First, the costs and expenses arising out of the arrest or seizure and the sale itself must be paid out of the proceeds.¹⁰⁵ Following them, the costs by

¹⁰¹ As in English law, see Meeson - Kimbell, *Admiralty Jurisdiction and Practice*, cited in footnote 87, para. 4.93-94.

¹⁰² As in Dutch law, the Dutch Code of Civil Procedure, art.575 para.2, see Bleyen, *Judicial Sales of Ships: A Comparative Study*, cited in footnote 39, p. 86.

¹⁰³ The MLM Convention 1993, art.6.

¹⁰⁴ The MLM Convention 1993, art.12(2).

¹⁰⁵ The MLM Convention 1993, art.12(2).

a public authority in the interests of safe navigation or marine environment rank in the second place.¹⁰⁶ Then, secured maritime claims will be satisfied.¹⁰⁷ Additionally, whoever enjoys a right of retention, though having to surrender the ship to the purchaser, is entitled to obtain satisfaction of the claim right after maritime lien holders.¹⁰⁸ Finally, and in case there is residue of the proceeds after the distribution for the aforementioned claims and costs, the remaining must be returned to the ship-owner.¹⁰⁹ In light of the fact that notice of sale contains the date on which claims for distribution shall be filed, the previous creditors may lose the opportunities to be paid out if they cannot file claims within the fixed period, failing to make themselves known to the sale authority. Remote but not irrelevant, whether *in personam* claims can pursue the residue is to be answered by the relevant applicable law, falling outside of the scope of the convention.

As to the actual process of distribution, it is subject to the *lex fori processus*. Usually, an appointed liquidator, who may be a judge,¹¹⁰ a liquidator,¹¹¹ or a public officer,¹¹² depending on the jurisdiction carrying out the sale, presides over the distribution of proceeds. Procedures of liquidation vary greatly between jurisdictions; nevertheless, the essential steps seem similar. The liquidator first notifies and informs the known creditors of the readiness of the proceeds, secondly proposes a division of funds and informs creditors of the period during which they may object against the division, and finally orders the fund's custodian to distribute in accordance with the amount decided. In case the recognition of claims¹¹³ is entailed, judge(s) or the liquidator will hear and decide claims according to the *lex fori processus'* conflicts law¹¹⁴ concerning the existence and ranking of maritime security. With regard to disputes

¹⁰⁶ The MLM Convention 1993, art.12(3).

¹⁰⁷ The MLM Convention 1993, art.12(2).

¹⁰⁸ The MLM Convention 1993, art.12(4).

¹⁰⁹ The MLM Convention 1993, art.12(2).

¹¹⁰ In English law, the admiralty judge decides the priority and pay-out of the claims, see Meeson - Kimbell, *Admiralty Jurisdiction and Practice*, cited in footnote 87, para. 4.131; In Chinese law, the maritime judge presides distribution, the Chinese Maritime Special Procedure Law, art.117.

¹¹¹ In Belgian law, the liquidator appointed by the court presides distribution, see Bleyen, *Judicial Sales of Ships: A Comparative Study*, cited in footnote 39, p. 55.

¹¹² In the Netherlands, an official receiver is appointed by the provisional measures judge as the liquidator, see *ibid.*, p. 86.

¹¹³ For recognition of claims, some jurisdictions require judgments, for instance, in Chinese law maritime judges need to decide the validity of claims before claims are transferred to the liquidator to establish a ranking of claims, the Chinese Maritime Special Procedure Law, art.116. Contrarily, other jurisdictions do not require as such, as illustrated by Belgian law under which the liquidator is competent to decide the validity and ranking of claims, see *ibid.*, p. 55.

¹¹⁴ Through ratification, the convention becomes part of the municipal law of a state party.

upon the ranking of claims, not all jurisdictions allow challenging to an established division.¹¹⁵ If allowed, the competent judge¹¹⁶ or the liquidator¹¹⁷ will make a conclusive decision.

3.6. Certificates Attesting Sales

At the request of the purchaser, the competent authority in the state conducting the sale shall issue a certificate attesting that the property change, provided that this change has been made in accordance with the uniform substantive rules and the *lex fori processus*.¹¹⁸ It follows that the state of the sale is obliged to conduct a review by itself on the validity of property change, before issuing the certificate.

The objective of issuing such a certificate seems to lie in its evidentiary value according to which the legal situation incorporated therein has actually taken place with the effects that the convention has accorded to the forced sale, i.e., transfer of ownership upon a vessel free from encumbrances. Certificates with such a value are often used in international conventions, particularly those in respect of family law matters.¹¹⁹ However, there are a number of elements unclear in this case.

The convention does not address which authority is competent to issue a certificate at the request of the purchaser. Neither does it stipulate the specific elements of the sale to be incorporated into the certificate, as well as the form of the certificate. Can this certificate be digital? Must it contain details of the claim giving rise to the sale? It all depends on the country of forced sale to decide. Despite these legal divergences, coordination mechanisms are not put in place in order to inform other parties to the convention about the arrangements that can be made at the national level on these matters.

¹¹⁵ In Chinese law, whether the objection procedure in general civil execution with regard to a division of funds applies to the ship's proceeds is controversial and lacks positive law. Nevertheless, as indicated by the online guidance of auction of the Nanjing Maritime Court, the decision of the ranking of claims, made after three rounds of mandatory discussions, among creditors and between court's sale committee, seemingly cannot be objected. <[南京海事法院《南京海事法院船舶拍卖工作指南》\(njhsfy.gov.cn\)](http://njhsfy.gov.cn)> accessed 08 August 2021.

¹¹⁶ As in Belgian law, see Bleyen, *Judicial Sales of Ships: A Comparative Study*, cited in footnote 39, p. 55.

¹¹⁷ As in Dutch law, see *ibid.*, p. 86.

¹¹⁸ The MLM Convention 1993, art.12(5). Free of encumbrances, except the mortgages, hypothèques or charges assumed by the purchaser.

¹¹⁹ F. Salerno, *The Identity and Continuity of Personal Status in Contemporary Private International Law*, Collected Courses of the Hague Academy of International Law, Vol. 395, para. 71.

4. Recognition of the Purchaser's Title Abroad

Upon the production of the above-mentioned certificate by the competent authority in the country where the ship has been sold, “the registrar shall be bound to delete all registered mortgages, “hypotheques” or charges except those assumed by the purchaser, and to register the vessel in the name of the purchaser or to issue a certificate of deregistration for the purpose of new registration, as the case may be”.

¹²⁰ Should this certificate be presented before a registrar in the state that conducted the sale, no doubts may arise with regard to the validity of the property change embedded therein. However, the extent to which this duty bounds authorities in other states, is unclear. As can be read in Article 12, the focus of the MLM convention in this respect is on the country of the forced sale, except for the reference to the registrar, i.e., the convention does not address the recognition of the title abroad. At least not in a direct manner, if taking into account that all above-analysed requirements to conclude a sale free from encumbrances seek to ensure the legal effects of the change of ownership abroad.

Against an international background, the recognition of the purchaser's title abroad with the said effects is of the essence, although hard to achieve. Even if steps of a sale procedure were principally identical in all jurisdictions, the validity of the purchaser's title might still be challenged in the country of recognition and on different grounds.¹²¹ The MLM Convention might help to avoid such challenges through its provisions on forced sales. A case in St Vincent and the Grenadines, concerning the legal effects of two forced sales, first in North Korea and then China,

¹²⁰ The MLM Convention 1993, art.12(5).

¹²¹ Three jurisdictions are referred to as examples to show the legal divergences in this topic. In common law jurisdictions, represented by English law, the legal effects of foreign judicial sales are to be recognised qua assignment in the recognition of in rem judgments, according to the rules established by Blackburn J in the case *Castrique v Imrie* (1869-70) LR 4 HL 414, see D. C. Jackson, *Enforcement of Maritime Claims*, Informa Law from Routledge, 2005, para. 27.33; A. V. Dicey - L. Collins – J. H. C. Morris, *Dicey, Morris & Collins on the Conflict of Laws*, Sweet and Maxwell, 2015, para. 14R-108, 14-111.

In civil law jurisdictions, such as Dutch law, the legal effects of judicial sales are matters to be decided by applicable law, as shown by a Dutch case given by the Amsterdam District Court in 2004 regarding the ship *The Katerina* which was previously sold in a Chinese maritime court. The court held that the effects of this sale with respect to the ship's title were governed by Chinese law, see Amsterdam District Court, *Esquire Management Co. v. ETA Petrol Akaryakat Ticaret ve Nakliyat A.S.*, Case No. KG04/912P, Judgment, 7 May 2004.

In Asian jurisdictions, such as Chinese law, there is no specific rules for deciding legal effects of judicial sales, the effects of a sale as to ceasing charges attached to the ship are to be decided by the applicable law to the relevant charges, as indicated by the case involving the ship *Union*, see Tian Jin Maritime Court (2005) Jin Hai Fa Shang Chu Zi No. 401.

of the ship *Phoenix*, makes a good illustration here of the potential significance of the MLM convention.¹²²

The ship entered on the register of St Vincent and the Grenadines, and a mortgage of a French bank was recorded thereof the same year. In 2004, the ship was judicially sold in a North Korea court and subsequently sold on by the purchaser to company A. In 2008, company A brought a proceeding in the court of St Vincent and the Grenadines to seek an order compelling the registrar in that state to deregister the ship from the register. The reason why the registrar refused to deregister at the request of company A was that there was an undischarged mortgage on the record.¹²³ During the said proceeding, in 2010, the same ship was sold in a Chinese maritime court to company B. Consequently, company B was made a party to the proceeding concerned. The mortgagee contended that the previous two forced sales, in North Korea and China, were invalid since they had not been concluded in accordance with Article 11 and 12 of the MLM Convention, and thus its mortgage was intact. The judge held that as China and North Korea were not parties to the MLM Convention to which St Vincent and the Grenadines was a party, the convention did not apply to this case and thus could not determine whether those two forced sales were legally binding or not; instead, common law rules should apply.¹²⁴ According to common law, company B obtained a clean title from the Chinese sale, as well as company A from the North Korean sale. Hence, the judge declared that the mortgage was cleared from the ship through the North Korean judicial sale, and ordered the registrar to deregister on the basis that the ship was no longer entitled to remain registered since the ultimate ship-owner company B was not qualified to be a ship-owner in St Vincent and the Grenadines. Later the mortgagee made an appeal that was dismissed.

Should the MLM convention have been applied, the situation would have differed. However, it is debatable to what extent. As a uniform law convention, the MLM convention seems to have tried to harmonise the requirements to conclude a valid change of ownership worldwide recognisable, but has failed to pay enough attention to the mechanism to make it recognisable abroad. This is, of course, the case of countries that are not parties to the convention and hence are entitled to ignore a

¹²² *The Phoenix* [2014] 1 Lloyd's Rep 449.

¹²³ As a matter of fact, the refusal of the registrar of St Vincent and the Grenadines is not unusual. Upon the request of a purchaser, at the first place, a registrar who usually applies the *lex executionis* to decide the proprietary interests on the ship, such as an English or Dutch registrar, will not immediately recognise the purchaser's title obtained via a foreign judicial sale. Instead, the registrar will require either the consent of the previous registered owner or creditors, or a domestic court's order for deregistration. See Bleyen, *Judicial Sales of Ships: A Comparative Study*, cited in footnote 39, p. 96,123.

¹²⁴ *The Phoenix* [2014] 1 Lloyd's Rep 449 [35]-[37].

certificate issued in accordance with Article 12 and in general, other provisions dealing with forced sale in the convention.¹²⁵ If the other country is a party to the convention, a certificate has to have a value given the said provision, at least in the country of the ship's registration. However, the certificate's value appears inadequate for recognizing the title upon the ship. First, the specific reference to just one authority, the register, limits the value of this certificate and, more importantly, indicates that the convention does not address recognition matters. Second, Article 12(5) of the MLM Convention does not indicate in which circumstances this certificate is to be recognized by the registrar, but implies that if the certificate is issued by a competent authority and complies with all the above-discussed rules, then produces legal effects, including accessing the foreign register.

In the literal sense, according to Article 12(5), the registrar seems to be bound to accept not only the certificate but also the legal effects of the recorded sale and thus obliged to delete all relevant encumbrances in the register. This would operate on the basis of Article 12(5) allocating different roles to the state of forced sale and to the state of the ship's registration, i.e., the former is obliged to "... issue a certificate to the effect that the vessel is sold free of all registered mortgages, "hypotheques" or charges, except those assumed by the purchaser, and of all liens and other encumbrances, provided that the requirements set out in paragraph 1 (a) and (b) have been complied with"; while the latter is not allowed to check the compliance of these requirements. However, this is not in line with the *modus operandi* of recognition of legal situations abroad; even in cases of automatic recognition, there are strict rules on the authenticity of documents and public order requirements.¹²⁶ These developments are not included in the MLM convention; instead, it focuses on the country selling the ship while omits the steps to be taken in the country of recognition.

At the outset, the registration state needs to examine the authenticity of the certificate. If the certificate itself is denied, the quest for recognition is over. The MLM Convention does not address authenticity issues,¹²⁷ including which authority is competent to issue the certificate. The same applies to other grounds for (non-

¹²⁵ The MLM Convention is applicable between its state parties. For the non-party states, the convention can apply as part of the applicable foreign law, "with all of the consequences that go hand in hand with the application of foreign law, from the need and ways to prove the foreign law, to the consequences of its erroneous application. See F. Ferrari, *Forum Shopping Despite Unification of Law*, Collected Courses of the Hague Academy of International Law, Vol. 413, p. 129.

¹²⁶ D. Coester-Waltjen, *Recognition of legal situations evidenced by documents*, Encyclopedia of Private International Law, p. 1495; Salerno, *The Identity and Continuity of Personal Status in Contemporary Private International Law*, cited in footnote 119, para. 76-77.

¹²⁷ Although it is presumed that the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 527 UNTS 189, might be applicable.

)recognition, which are to be examined following the authenticity. While the registrar can accept the certificate as a *prima facie* evidence of the legal situation therein embedded provided that the certificate is authentic and has been issued by a competent authority in the country where the ship was sold, the change of registration process might be challenged on any of the above-mentioned requirements: jurisdiction, notice and proceeds distribution might be requested to be again reviewed by the registrar upon request. Technically, the registration state can examine whether the original state has correctly applied its own law in concluding the sale or not. The whole sale process can be under review, if the registration state deems fit.¹²⁸ In view of challenges arising mainly from creditors and the former ship-owner, Article 11(1) is of particular relevance in this respect to the extent that it ensures that all relevant parties are informed with sufficient time to participate in the forced sale. This provision should not only neutralise claims, arising out in whatever countries, by the persons specifically mentioned in the notification list, but also by others not included therein.

The MLM convention does not seem to address the change of ownership as a decision that might follow a procedural recognition model, but the certificate to be issued in accordance with Article 12 is certainly an excellent basis for pursuing this approach. However, nothing is said in this respect.¹²⁹ In particular, Article 12(5) does not refer to other authorities of the state where the ship is registered or to the authorities of any other state. However, it might be the case that they need to recognise the legal effects of the forced sale as well. For example, the title has been challenged in this country before a court of justice or a creditor has requested the arrest of the ship in a country other than the one where the ship was already sold or is registered. Although the MLM convention does not refer to any of these instances, the countries involved are also obliged to recognise the legal effects of the forced sale to the extent that they are its parties. This obligation is an internal gap that shall be filled in either “from within a given convention by resorting as much as possible to the general principles upon which that convention is based,”¹³⁰ or by analogical

¹²⁸ At least, in the MLM Convention terms, there is no forbiddance of doing so.

¹²⁹ In the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption (1870 UNTS 167), the co-operation between states in establishment of adoption is much, so the recognition of adoption as certified on the certificate only has one ground for non-recognition - the public policy of the recognition state. In contrast, under the Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages (the Marriage Convention) (1901 UNTS 131), the celebration of marriage is governed by the law of the place where the marriage is celebrated. Namely, there is not so much co-operation between states. The subsequent recognition of validity of marriages is subject to certain substantive requirements as well as the public policy.

¹³⁰ Ferrari, *Forum Shopping Despite Unification of Law*, cited in footnote 125, p. 169; J. Basedow, *Uniform law Conventions and the UNIDROIT Principles of International Commercial Contracts*, Rev.dr.unif, Vol. 5 (2000), p. 129.

application of specific provisions to the extent that “the matters settled in a convention and the issue the internal gap refers to are so closely related” that it would be unfair to adopt a different solution.¹³¹

As it stands, should the MLM Convention have been applied in the case concerning the ship *Phoenix*, under the hypothesis that all involved states were parties to this convention and both forced sales had been concluded under the convention, St Vincent and the Grenadines would have recognised the purchasers’ title as recorded in the certificates issued by North Korea and China in accordance with the convention. Nevertheless, it would also have been the case that, given the limited value of certificates, the recognition would have been refused, provided that the law of St Vincent and the Grenadines would have found prerequisites for recognition not met or grounds for non-recognition present. Despite that the grounds for (non-) recognition could be either relatively liberal or extremely harsh, unfortunately, the MLM Convention has no bearing upon the list of these grounds.

In conclusion, the recognition process depends on the relevant country; nevertheless, the uniform provisions of the convention do have an impact on the relevant proceeding, in the sense that the contents of those proceedings will focus first on whether the certificate is authentic and issued by a competent authority, and second on the other requirements established in the convention to conclude a sale that provides a title free from encumbrances.

5. The MLM Convention 1993 and the UNCITRAL Draft Convention on Judicial Sales of Ships: Parallelism and Differences

The steps taken by the MLM Convention to ensure the legal effects of a forced sale abroad are not in line with the recognition model but still concentrated on the choice of law model by resorting to uniform substantive and conflict rules governing the proceeding of a forced sale in the country where the ship is physically located. This choice of law approach, however, does not favour the free circulation of title because it does not restrict the grounds for (non-)recognition abroad. A different approach, operating on the basis of the automatic recognition of the certificate attesting the purchase, demonstrates mutual trust among the parties to the convention. However, the lack of reference to the country of recognition in the convention, apart from the reference to the ship’s register, does not allow this interpretation.

¹³¹ Ferrari, *Forum Shopping Despite Unification of Law*, cited in footnote 125, p. 176.

Against this backdrop, the CMI conducted a survey by circulating questionnaires among countries inquiring whether the MLM Convention provisions were “appropriate as basic requirements for recognition of a foreign judicial sale of ship.”¹³² However, the replies thereof majorly concerned the gloom prospect of this convention caused by the impossibilities of erasing the conflict of maritime securities, rather than arguing the cons and pros of the provisions on recognition matters.¹³³ Anyhow, at least, it has been believed that the MLM Convention could be facilitated by a separate international instrument in respect of recognition.¹³⁴ Hence, an attempt to harmonise rules on recognition was initiated by the CMI and has been pursued further by the UNCITRAL.

The ongoing work about a future convention on the recognition of the purchaser’s title obtained through a judicial sale, temporarily called “Beijing Draft”, has achieved its fourth revision.¹³⁵ The “judicial sale” in the draft means any sale of a ship that is ordered, approved or confirmed by a court or other public authority and for which the proceeds of sale are made available to creditors.¹³⁶ The sales governed in the draft, therefore, overlap with those in the MLM Convention, albeit excluding the discussion on maritime liens and privileges.

From the original version proposed by the CMI in April of 2009¹³⁷ to the latest one prepared by the UNCITRAL in August of 2021,¹³⁸ the recognition approach proposed by the draft has been through several changes. The original approach follows the structure of the MLM Convention.¹³⁹ For recognition of a judicial sale, it seems of necessity that, on the one hand, minimum standards of the sale procedure have been met in the state conducting the sale. On the other hand, once a sale certificate is presented before a member state, the purchaser’s title recorded in that certificate must be recognised, provided that no grounds for non-recognition is later

¹³² Berlingieri, *Synopsis of the Replies from the Maritime Law Associations of Argentina, Australia, Belgium, Brazil, Canada, China, Croatia, Denmark, Dominican Republic, France, Germany, Italy, Japan, Malta, Nigeria, Norway, Singapore, Slovenia, South Africa, Spain, Sweden, America, Venezuela to the Questionnaire in Respect of Recognition of Foreign Judicial Sales of Ships*, cited in footnote 37, p. 370.

¹³³ *Ibid.*, p. 379-382.

¹³⁴ Sharpe, *Towards an International Instrument for Recognition of Judicial sales of Ships – Policy Aspects*, cited in footnote 7.

¹³⁵ UNCITRAL, A/CN.9/WG.VI/WP.92.

¹³⁶ The fourth version of the Beijing Draft, art.2(c), as the annex of UNCITRAL, A/CN.9/WG.VI/WP.92. Hereinafter referred to as the fourth version of the Beijing Draft.

¹³⁷ UNCITRAL, A/CN.9/WG.VI/WP.82.

¹³⁸ UNCITRAL, A/CN.9/WG.VI/WP.92.

¹³⁹ The original version of the Beijing Draft, art.7(1), as the annex of UNCITRAL, A/CN.9/WG.VI/WP.82. Hereinafter referred to as the original version of the Beijing Draft.

presented.¹⁴⁰ After the UNCITRAL took over the work, its first version was produced based on the CMI original version. Nevertheless, the first version follows more closely the language and structure of Article 12(1) of the MLM Convention.¹⁴¹ A proviso in the bracket in the provision concerning the sale's international effects requires that, in order for sale to have international effects, the sale must have complied with the national law of the state conducting the sale, together with the draft requirements for sales.¹⁴² Such compliance is not listed as a ground for non-recognition in the relevant provision.¹⁴³ However, one might question whether this compliance constitutes prerequisites for recognition. From the language of the proviso, the answer is probably yes.

The second version in general is identical to the first version in light of recognition matters.¹⁴⁴ The third version, however, takes into consideration approaches to recognition that deviate from its precursors and represent more mutual trust between states.¹⁴⁵ Under the third version, two optional formulations are provided for deliberation. The first formulation excludes the compliance with national law of the sale state from the prerequisites for a judicial sale to have international effects, retaining only the notice requirements of the draft.¹⁴⁶ Besides, by making the physical presence of the ship within the territory of the sale state as a factor to restrict the scope of application of the draft convention, the ship's location is no longer linked with the granting of international effects, although the authority seized of recognition issues may in practice first scrutinize the location of ship at the time of sale in order to decide whether or not to apply the draft convention at all.¹⁴⁷ The

¹⁴⁰ The original version of the Beijing Draft, art.8. There are four grounds of non-recognition: (i) at the time of sale, the ship was not physically within the jurisdiction of the state conducting the sale, (ii) the sale has been challenged before the court of the state conducting the sale, and suspended because of that challenge, (iii) the sale was nullified by the court of the state conducting the sale, (v) the recognition of sale would be manifestly contrary to the public policy of the recognition state.

¹⁴¹ The first version of the Beijing Draft, art.4, footnote 19 and its accompanying text, as the annex of UNCITRAL, A/CN.9/WG.VI/WP.84. Hereinafter referred to as the first version of the Beijing Draft.

¹⁴² The first version of the Beijing Draft, the texts in the bracket in art.6.

¹⁴³ The first version of the Beijing Draft, art.10.

¹⁴⁴ The second version of the Beijing Draft, as the annex of UNCITRAL, A/CN.9/WG.VI/WP.87. Hereinafter referred to as the second version of the Beijing Draft.

¹⁴⁵ The third version of the Beijing Draft, as the annex of UNCITRAL, A/CN.9/WG.VI/WP.90. Hereinafter referred to as the third version of the Beijing Draft.

¹⁴⁶ The third version of the Beijing Draft, arts.6 and 10. The other grounds for non-recognition remain, including the sale is being suspended or has been nullified(art.9), and the recognition would be contrary to public policy(art.10).

¹⁴⁷ The third version of the Beijing Draft, art.3.

alternative approach is even more generous, but focused on the certificate instead of the sale embedded therein. As long as a sale certificate is presented, the recognition state will recognise the certificate to the effect that not only the title but also other particulars recorded therein will be rendered as conclusive, without any prerequisites.¹⁴⁸ In the latest fourth version, a choice is made with regard to the two formulations; that is, a combination of them is better. The fourth version will only automatically recognize the validity of title as certified on the certificate, rather than the certificate itself,¹⁴⁹ with no prior review on the compliance to the draft and national law.¹⁵⁰

Based on the above findings, it is submitted that the original version follows the model of automatic recognition that amounts to “a presumption of the authority and effectiveness”¹⁵¹ of foreign judicial sales for which certificates in accordance with the draft provisions have been issued, “without any prior proceedings or formal steps”¹⁵². If a certificate attesting to a sale is presented before the competent authority of a member state, that state shall accept the presumptive validity of the title conferred by the sale, as such as certified on the certificate. The recognition may, later on, be rebutted if one of the grounds for refusal is presented,¹⁵³ such as those listed in the relevant provision. On the contrary, the first and second versions do not envisage automatic recognition. Instead, they consider a recognition model which does require prior proceedings to the extent that the recognition state shall scrutinise the compliance with the draft and national law in the sale process. The third approach provides a possibility of reverting to automatic recognition of judicial sales, which is finally actualised in the fourth version. When a sale certificate is presented, the fourth version will give effect to the title conferred on the purchaser as recorded in that certificate, unless grounds for non-recognition are presented later. Compared to the original version, although in light of the recognition principle, the fourth version is in the same vein, the fourth not only provides more clarity in terms of language and structure, but also better allocates recognition factors, such as ship’s location and the sale’s nullification, in the recognition mechanism. As it stands, the latest version of the draft complements and updates the MLM Convention regarding international recognition of judicial sales. With that,

¹⁴⁸ Ibid.

¹⁴⁹ The UNCITRA seemingly wants to avoid a regime for the recognition of foreign certificates, UNCITRAL, A/CN.9/WG.VI/WP.92, para.20.

¹⁵⁰ The fourth version of the Beijing Draft, art.6.

¹⁵¹ Salerno, *The Identity and Continuity of Personal Status in Contemporary Private International Law*, cited in footnote 119, para. 71.

¹⁵² *ibid.*

¹⁵³ U. Magnus – P. Mankowski (eds), *European Commentaries on Private International Law ECPII Commentary Volume I Brussels Ibis Regulation 2016*, Verlag Dr. Otto Schmidt KG, 2016, p. 818.

silence in the said convention about recognition could be redressed, and consistency of recognition might be achieved.

Instead of picturing a substitution of the MLM Convention with the Beijing Draft in situations where the recognition of judicial sales is needed, it is anticipated that, on the basis of the overlap between these two instruments, their relevant provisions concerning judicial sales and international recognition of such sales may supplement each other in the future.

6. Conclusion

What to recognise in the recognition of a foreign judicial sale is the purchaser's title obtained in that sale. The MLM Convention 1993 has strived for a consistent approach in recognising title. However, its focus is mainly on the harmonisation of procedural requirements to effectuate the title in the state where the ship was located at the time of the sale; whereas, failing to address recognition matters abroad, except for a reference to the registrar as to change of registration after the sale. Relevant national law determines the recognition process. That said, it is to note that the convention rules, governing the certificate and requirements of sale, still have an impact on the proceedings of recognition.

A future convention, called "Beijing Draft", provides for a more consistent approach to the recognition of title. The last version of the draft follows the model of automatic recognition under which as long as a sale certificate issued in accordance with the draft requirements is presented, the purchaser's title recorded on that certificate will be automatically recognised as valid in every other member state, unless later rebutted if any ground for non-recognition is presented. Considering the overlap of the object, judicial sales of ships, governed by both the draft and the MLM Convention 1993, it is possible that these two instruments may facilitate each other in the future for the purpose of safeguarding the integrity of judicial sales worldwide.

Paper 2

Recognition of Foreign Judicial Sales of Ships and Private International Law

Paper 2 Yingfeng Shao, Laura Carballo Piñeiro and Maximo Q. Mejia. Jr., 'Recognition of Foreign Judicial Sales of Ships and Private International Law' (2022) 3 JIML 166.

Abstract: Against the consensus that the certainty of the title conferred by a judicial sale benefits maritime trade and thus shall be maintained, this article takes a close look at the national regimes for recognition of foreign judicial sales of ships in defined states.

The comparative analysis of private international law rules undertaken in this article shows that the procedural recognition method better safeguards legal certainty and proffers predictability than the material recognition method. With procedural recognition, recognition of foreign judicial sales becomes more feasible. That said, recognition is not necessarily guaranteed when procedural recognition is followed. Notwithstanding a consensus that judgments ordering the transfer of ownership are the title or subject to be recognised, the national regimes following this method have different understandings as to what the finality of a judgment means. Moreover, they apply varying criteria for assessing the generally accepted conditions for recognition. In view of these findings, this article concludes that an international uniform recognition approach is needed to safeguard the finality and integrity of judicial sales.

1. Introduction

“Essential to the practice of maritime law in any country is a knowledge of the procedures that provide pre-judgment security for claims, as well as post-judgment execution if a suit is allowed.”¹ The most common post-judgment execution in

¹ William Tetley, 'Arrest, Attachment, and Related Maritime Law Procedures' (1999) 73 *Tul.L.Rev.* 1895, 1898.

maritime law is judicial sales of ships. As “the eye of the hurricane where it is apparent that the air is undisturbed”,² the principle that a judicial sale transfers a valid and clean title has been shared across jurisdictions.³ Through a judicial sale, creditors settle their claims once and for all. Charges over the ship, including mortgages, rights of retention and maritime liens, cease to attach to the ship and are passed on to the sale proceeds; meanwhile, the successful bidder in the judicial sale obtains the ship’s ownership free from encumbrances.⁴ Without the prospect of a valid and clean title, no purchaser would pay a market price for a ship⁵ and thus, the proceeds to be distributed among creditors might be reduced.⁶ This, in turn, would discourage investors from financing shipowners in the future, adversely affecting the well-being of international trade.

However, due to the international nature of maritime ventures, the purchaser’s title obtained from a judicial sale in one country may be contested in another. For instance, creditors who have not been sufficiently satisfied out of the proceeds might apply for ship arrest and sale in a state other than the one that conducted the sale. Additionally, the ship must possess a nationality attained by registration of it in a defined nation.⁷ The purchaser might encounter problems when applying for deletion or change of the ship’s registration or invoking recognition of the title in the country of the most recent registry.

In view of all these potential challenges, the United Nations Commission on International Trade Law (UNCITRAL) has been discussing a future international convention governing the recognition of foreign judicial sales since 2019.⁸ The

² Grant Gilmore and Jr. Charles L. Black, *The Law of Admiralty* (Foundation Press 1975) 787.

³ For common law countries, see W. Wylie Spicer, ‘Court-Ordered Sale of Vessels’ (1979-1980) 11 *J. Mar. L. & Com.* 239; Paul Myburgh, ‘“Satisfactory for its Own Purposes”: Private Direct Arrangements and Judicial Vessel Sales’ (2016) 22 *J.I.M.L.* 355. For civil law countries, see Jan Erik Pötschke, ‘Judicial Sale of Ships in Germany as an Example for a Civil Law concept’ in CMI, *Yearbook 2013*, 143-150; For Chinese law, Mark Sachs and Yafeng Sun, ‘China Part III. Judicial Sales of Vessels and Priority of Claims’ in Christian Breitzke and Jonathan Lux (eds.), *Maritime Law Handbook* (Kluwer Law International BV 2019).

⁴ Although in principle all jurisdictions provide a clean title, some jurisdictions may allow some charges to continue over the ship, such as member states to the Geneva Convention on Maritime Liens and Mortgages, 1993 (2276 UNTS 39). Article 12 allows certain charges to attach to the ship after a judicial sale.

⁵ Comité Maritime International (CMI), *Yearbook 1985 Lisboa I*, 46. This report reiterates the significance of clean title of ship with regard to the obtaining of the highest sale price.

⁶ Myburgh (n 3).

⁷ Iain Goldrein and others, *Ship Sale and Purchase* (Informa Law from Routledge 2017) para 1.6.1.

⁸ Documents about the progression of this draft can be found on the website of the UNCITRAL: main page – working documents – Working Group VI <https://uncitral.un.org/en/working_groups/6/sale_ships> accessed 28 October 2021.

UNCITRAL working group of this draft convention proposes that, despite recognition mechanisms for foreign judicial sales in national legal systems, a uniform solution is still essential to facilitating the continuous validity of the title conferred by sales.⁹ It implies that national recognition regimes are regarded, at least by some experts,¹⁰ as insufficient to provide adequate legal certainty for the title vested by judicial sales.

From a judicial perspective, two factors contribute to the said uncertainty: divergent maritime laws that motivate creditors to challenge judicial sales abroad, and various national recognition solutions under which the effects of a foreign judicial sale are to be decided. Rights on a ship are defined, ranked and enforced differently across legal systems.¹¹ Should an improper forum be chosen, a holder of right might not be sufficiently satisfied from the sale proceeds, or protected as expected. In domestic litigations, this is the end of a story. However, shipping is by nature international. After the sale, a holder could challenge the finality and integrity of the sale by initiating a recognition proceeding before a foreign court within whose jurisdiction the ship is situated. If the challenge could be supported, the right previously purged by the sale would restart to bind the ship in the foreign country. Accordingly, enforcement of that right against the ship might be allowed. Whether or not a judicial sale will be deprived of its effects in a foreign country depends on the regimes for recognition of foreign judicial sales in other countries. National regimes of recognition differ from each other greatly. Some are lenient and respect the comity of nations, whereas some are strict and guarantee protection for the maritime rights governed under their own laws. Thus, the same sale might be treated differently in different states.

Efforts have been made to iron out the variables arising with respect to maritime rights. However, despite the extraordinary efforts striving for international agreement, a universal uniformity of law governing maritime claims has not been obtained.¹² The Brussels Convention for the Unification of Certain Rules of Law

⁹ UNCITRAL, A/CN.9/WG.VI/WP.92, preamble.

¹⁰ William M. Sharpe, 'Towards an International Instrument for Recognition of Judicial Sales of Ships – Policy Aspects' in CMI, *Yearbook 2013*, 166-182.

¹¹ José Maria Alcantara, 'A Short Primer on the International Convention on Maritime Liens and Mortgages 1993' (1996) 27 *J.Mar.L.&Comp.* 219; Francesco Berlingieri (eds.), *Essays on Maritime Liens and Mortgages and on Arrest of Ships: Prepared from Lectures given to an International Workshop at Dalian, People's Republic of China, October and November, 1984*; Sjur Brækhus, *Choice of Law Problems in International Shipping (Recent Developments)*, Collected Courses of the Hague Academy of International Law, vol 164; Anonymous, 'The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Conventions to Achieve International Agreement on Collision Liability, Liens, and Mortgages' (1955) 64 (6) *The Yale Law Journal* 878.

¹² Anonymous (n 11) 893.

Relating to Maritime Liens and Mortgages, 1926¹³ lacks support from common law countries while its successor, the Geneva Convention on Maritime Liens and Mortgages, 1993¹⁴ attracts even fewer countries. Divergent national laws are still dominant in the field of maritime claims.

The present time seems appropriate for a fresh look at the national rules governing the recognition of foreign judicial sales. This article explores the private international law rules in four legal systems, enquiring into the recognition regimes for foreign judicial sales from a comparative perspective. English law is selected as a representative of common law jurisdictions. Dutch law, “reflecting an important strand in the family of European codifications”,¹⁵ is selected as a peculiar legal system that has taken elements from various civilian nations. Dutch case law deserves particular attention, as it illustrates how foreign judicial sales would be recognised in a nation rooted in the civil law tradition. Maltese law is selected as an example of the mixed legal system. In addition to the European perspectives, Chinese law is selected to represent a unique Asian legal system.

Sections 2 to 5 of this article explain the respective national regimes in the selected legal systems, followed by a discussion in Section 6, wherein commonalities and divergences in the national regimes are summarised and compared. A harmonious and universal solution to the recognition of foreign judicial sale is proposed in Section 7, being the conclusion of this article. It is to note that this article concerns only municipal law. Even though treaties become a part of national law after a country has acceded to or ratified them, rules concerning recognition in treaties are not addressed here. Besides, judicial sales as concerned in this context do not include those ordered and carried out by non-courts authorities, such as a public notary sale.¹⁶

¹³ Adopted 10 April 1926, No. 2765. At present the convention is in force in the 24 states: Algeria, Argentina, Belgium, Brazil, Cuba, Estonia, France, Haiti, Hungary, Iran, Italy, Lebanon, Luxembourg, Madagascar, Monaco, Poland, Portugal, Romania, Spain, Switzerland, Syrian Arab Republic, Turkey, Uruguay and Zaire.

¹⁴ Adopted 6 May 1993, 2276 UNTS 39. At present the convention is in force in 19 states: Albania, Benin, Congo, Ecuador, Estonia, Honduras, Lithuania, Monaco, Nigeria, Peru, Russian Federation, Serbia, Spain, St Kitts and Nevis, St Vincent and the Grenadines, Syrian Arab Republic, Tunisia, Ukraine and Vanuatu.

¹⁵ Daniel Visser, ‘Unjustified Enrichment in Comparative Perspective’, in Methias Reimann and Reinhard Zimmermann (ed.), *The Oxford Handbook of Comparative Law* (Oxford University Press 2008) 970-1001, 975.

¹⁶ A sale that is ordered by a court, and subsequently conducted by a public officer who is appointed by the court, is included within the discussion, on the basis that the sale procedure is still under the control of the court. For instance, a sale in Belgian law. What is excluded is a sale that is ordered and carried out by a public notary, who is designated by the state for enforcement matters, such as a public notary sale in Dutch law. See Lief Bleyen, *Judicial Sales of Ships: A Comparative Study* (Springer 2016) 51, 82.

2. Recognition of foreign judicial sales of ships in English law

English law¹⁷ categorises judgments in various manners.¹⁸ Based on the scope of *res judicata*,¹⁹ a differentiation between judgments *in personam* binding only the parties to the proceedings, and judgments *in rem* conclusive against the world, is made.²⁰ According to the latest English case defining judgments *in rem* is *Pattni v Ali & Anor*,²¹ a judgment *in rem* is a decision adjudicating the status or disposition of property as against the world by a court with competent authority for that purpose. More specifically, the effects of foreign judicial sales of ships are determined under the regime for recognition of foreign judgments *in rem*.²² The outcome of a recognition is the acceptance of a valid and clean title in England.

There are two regimes for recognition of foreign judgments: the common law regime that requires the judgment creditor to commence fresh proceedings, and the statutory regime based on the registration of foreign judgments. Foreign judgments *in rem* can be recognised under the common law regime.²³ Usually, a summary judgment procedure instead of a full trial will be followed to adjudicate a foreign

¹⁷ The law of England and Wales. States other than these two also use English law for recognition matters, such as Scotland, albeit in some respects different. Cases from those states will be addressed, when appropriate, to interpret English law in this article.

¹⁸ An English law judgment is a decision with judicial character which determines a question of law, fact, or both law and fact. Whatever name the decision is called is of no importance. It can be any judicial adjudication, viz., judgments, rulings, orders and declarations. See Silja Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* (Oxford University Press 2016) 16.

¹⁹ Spencer Bower and others, *Res Judicata* (3rd ed.) paras 234, 261.

²⁰ Andrew Dickinson, 'The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process', European Community Framework Programme for Judicial Co-operation in Civil Matters (Dickinson said that the differentiation in terms of *res judicata* is somewhat misleading, because judgments *in personam* as much as judgments *in rem*, may have a legal effect beyond the parties to proceedings. By virtue of their subject matter, however, the immediate impact of judgments *in personam* is focused on the parties to the proceedings, and those claiming under them.)

²¹ [2006] UKPC 51, [2007] 2 AC 85.

²² Albert Venn Dicey and others, *Dicey, Morris & Collins on the Conflict of Laws* (15th ed., Sweet and Maxwell 2015) 716.

²³ *ibid.* para 14-112. It is possible that under a judgment *in rem*, a payable sum is also ordered. Then, this judgment is eligible for recognition under the statutory regime which recognises foreign judgments through registration of them.

judgment as the cause of action.²⁴ Recognition as an incidental issue, for instance, a foreign judgment is relied on as a defence in a proceeding in England, is also viable.²⁵ In that case, the requirements that must be complied with by a judgment creditor seeking recognition apply to the party who intends to rely on a foreign judgment.²⁶

2.1 Judicial Sales of Ships Recognised as Judgments *in rem*

Dicey, Morris and Collins state that a decision whereunder the sale of a thing is decreed to satisfy a claim against the thing itself constitutes a judgment *in rem*.²⁷ Recognition of a judgment *in rem* amounts to acceptance of the authority and effectiveness of the judgment and its subsequent sale. This recognition, in fact, is the recognition of the title that the sale ordered under the judgment has conferred on the purchaser, namely the recognition of the effects of the foreign judicial sale. There is a celebrated description of this kind of recognition – a foreign judgment is relied on *qua* an assignment rather than *qua* a judgment. When the purchaser of a judicial sale brings an action for wrongful interference against a person who denies its title to the ship, or seeks a declaration as to its ownership of the ship, what is relied on by the purchaser is the title deriving from a judgment *in rem*, rather than the source of it – the judgment.²⁸

The leading English judicial statement affirming the recognition of the effects of foreign judicial sales was given by Dr Lushington in *The Tremont*²⁹, who said: The jurisdiction of the [C]ourt in these matters (Lushington referred to the admiralty court) is confirmed by the municipal law of this country and by the general principles of the maritime law; and the title conferred by the [C]ourt in the exercise

²⁴ Andrew Bartlett and others, 'Enforcement of Judgments and Arbitral Awards in the UK: Overview' <[https://uk.practicallaw.thomsonreuters.com/6-619-3495?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/6-619-3495?transitionType=Default&contextData=(sc.Default))> accessed 11 January 2022.

²⁵ Dicey et al. (n 22) para 14-030.

²⁶ It means that an English court does not have to stay the proceeding while it awaits the outcome of an application for a foreign judgment to be recognised.

²⁷ Dicey et al. (n 22) para 14-109, two property-related judgments can be recognised as *in rem* in English law, consisting of a judgment whereunder either (i) possession or property in a thing is adjudicated to a person, or (ii) the sale of a thing is decreed in satisfaction of a claim against the thing itself.

²⁸ *ibid.* (n 22) para 14-110; Myburgh (n 3) 13.

²⁹ 166 ER 534, (1841) 1 W Rob 163, 164.

of this authority is a valid title against the world, and is recognised by the [C]ourts of this country and by the [C]ourts of all other countries.

English maritime law consists of two components, being general maritime law, on the one hand, and maritime statutory law, including national statutes and international conventions, on the other hand.³⁰ General maritime law, or *lex maritima*, is a complete legal system that has evolved for centuries. From its very beginning, probably contemporaneous with the advent of the civil law, it has been understood as international law rather than national law.³¹ Accordingly, as stated in *The Tremont*, the effects of a judicial sale under general maritime law, i.e., a clean title,³² must be respected on a world basis.³³

The principle set down by Dr Lushington was followed and enunciated by Blackburn J in *Castrique v Imrie*,³⁴ who, referring to the doctrine of *lex situs*, averred that –

In the case of *Cammell v Sewell*³⁵ a more general principle was laid down, viz., that “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.” This, we think, as a general rule is correct though no doubt it may be open to exceptions and qualifications; and it may very well be said that the rule commonly expressed by English lawyers, that a judgment *in rem* in binding everywhere, is in truth but a branch of that more general principle.

English law, as well as practically the majority of jurisdictions, submits property dispositions to the *lex situs*, together with the characterisation of movables and immovables, and the distinction between proprietary and contractual rights.³⁶ For

³⁰ William Tetley, ‘Maritime Law as a Mixed Legal System (with Particular Reference to the Distinctive Nature of American Maritime Law, Which Benefits from Both Its Civil and Common Law Heritages)’ (1999) 23 *Tul. Mar. L.J.* 317, 320-321.

³¹ William Tetley, ‘Uniformity of International Private Maritime Law - The Pros, Cons, and Alternatives to International Conventions - How to Adopt an International Convention’ (2000) 24 *Tul. Mar. L.J.* 775, 783.

³² Evidence in general maritime law in this respect can be traced back to the *Ordonnance de la Marine* of 1681, see William Tetley and Robert C. Wilkins, *Maritime Liens and Claims* (International Shipping Publications 1998) 1098.

³³ *The Trenton* (1880) 4 F. 657, 661 (US, E D Mich) Brown DJ: the doctrine that the sale of a vessel by a court of competent jurisdiction discharges her from liens of every description is the law of the civilized world.

³⁴ (1870) LR 4 HL 414, [1870] 4 WLUK 1.

³⁵ 157 ER 1371, (1860) 5 H&N 728,746.

³⁶ Gian C. Venturini, ‘I. The Law Applicable’, *International Encyclopedia of Comparative Law Online*, vol 3, ch 21, para 2.

the transfer of movables, the law of the country in which a tangible movable is situated at the time of transfer determines the validity of this transfer and its effects on the proprietary rights regarding the movable.³⁷ As asserted by Blackburn J, the universal binding force of a judgment *in rem* can be read as a branch of the general conflict rule referring to *lex situs*, according to which the validity and effects of a disposition by sale under the *lex situs* are binding everywhere.

Hewson J, alluding to the doctrine of comity, further explained the principle given by Dr Lushington, in *The Acrux*³⁸:

It would be intolerable, inequitable and an affront to the [C]ourt if any party who invokes the process of this [C]ourt and received its aid and, by implication, assented to the sale to an innocent purchaser, should thereafter proceed or was able to proceed elsewhere against the ship under her new and innocent ownership. This [C]ourt recognises proper sales by competent [C]ourts of Admiralty, or Prize, abroad – it is part of the comity of nations as well as a contribution to the general well-being of international trade.

Comity is a principle less than international law but more than mere courtesy. In modern common law, comity is not a basis for private international law but a tool for re-shaping it.³⁹ Briggs summarises the applications of comity into twelve points. The principal points are that comity requires a court to respect, and not to question or interfere with, the laws of a foreign country, the integrity of judicial orders made by a foreign court, and the integrity of judicial proceedings taking place before a foreign court, insofar as they apply to persons, property and events located within the territorial jurisdiction of the foreign country.⁴⁰ Briggs goes on to say that the restrictions of comity can be overridden by a court where it finds it has been so directed by its sovereign.⁴¹ According to these statements, and as stated by Hewson J, granting respect to the finality and integrity of a foreign judicial sale attends to the requirements of comity.

In conclusion, it is an ironclad principle in English law that the title conferred by the sale made by a court with competent jurisdiction is valid as against the world and hence shall be recognised by all countries. Three doctrines are in support of this principle, viz., being: (a) the general principle of general maritime law concerning

³⁷ Dicey et al. (n 22) rule 133.

³⁸ [1962] 1 Lloyd's Rep 405, 409, [1962] 4 WLUK 39.

³⁹ *Hilton v Guyot* (1895) 159 U.S. 113, 163-164 (US, SC). Dicey et al. (n 22) para 14-008.

⁴⁰ Adrian Briggs, *The Principle of Comity in Private International Law*, Collected Courses of the Hague Academy of International Law, vol 354.

⁴¹ *Adams v Cape Industries Plc.* [1990] Ch 433, 552, [1990] 2 WLR 657. Briggs (n 38).

judicial sales,⁴² (b) the general principle that *lex situs* governs dispositions of property,⁴³ and (c) the comity of nations.

2.2 Conditions for recognition

As a general understanding, recognition of a foreign judicial sale of a ship is not unconditional. The recognising country has to apply certain criteria to determine, whether and to what extent, it is willing to recognise, within its own territory, the finality and integrity of a foreign sale. There are six prevailing conditions to be met in English law for granting recognition to a foreign judicial sale. Two of them are specific conditions for judicial sales, set forth by Blackburn J in *Castrique v Imrie*,⁴⁴ and four are common conditions shared with general judgments.⁴⁵

First, the ship is situated within the territorial jurisdiction of the foreign country at the time of sale.⁴⁶ English courts will not recognise any judicial sale made by a foreign court that lacked jurisdiction.⁴⁷ It is suggested that even without the consent of the owner as to its being there, the foreign country may still assert jurisdiction over the *res* concerned.⁴⁸ Accordingly, if a ship is taken to a country without the consent of the shipowner, an English court will still render that that country has jurisdiction in relation to the ship. In addition, it is to note that the artificial *situs* of a ship has no use here. Although a merchant ship may sometimes be deemed to be situated at its port of registry,⁴⁹ especially in situations where the “ship is upon the

⁴² Tetley, *Maritime Liens and Claims* (n 32) 1098.

⁴³ Dicey et al. (n 22) rule 128: the law of a country where a thing is situated determines whether (1) the thing itself is to be considered an immovable or a movable; or (2) any right, obligation, or document connected with the thing is to be considered an interest in an immovable or in a movable.

⁴⁴ (n 34) 428-429.

⁴⁵ In principle, conditions for recognition of judgments are the same for both decisions *in rem* and *in personam*, but some do not fit with decisions *in rem*, therefore only relevant ones are discussed here. For all conditions for recognition, see David. C. Jackson, *Enforcement of Maritime Claims* (Informa Law from Routledge 2005) para 27.34.

⁴⁶ Dicey et al. (n 22) rule 47. *Castrique* (n 34) 428-429.

⁴⁷ Jean-Gabriel Castel, ‘Recognition and Enforcement of Foreign Judgments *in Personam* and *in Rem* in the Common Law Provinces of Canada’ (1971) 17 McGill Law Journal/Revue de Droit de McGill 11, 28.

⁴⁸ Dicey et al. (n 22) para 14-113. Read opposes to this opinion, and opines that lacking the consent of owner, if a movable is nevertheless taken into a country, that country cannot assert jurisdiction over that thing. See H. E. Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (Harvard University Press 1938) 139-140.

⁴⁹ Dicey et al. (n 22) para 22E-057.

high seas,⁵⁰ when the ship is situated within the territory of a defined country, the artificial *situs* shall be displaced by the physical *situs* of the ship, as the reason for referring to the law of the flag becomes un compelling then.⁵¹

Second, the foreign court is competent under its own law to adjudicate on property dispositions rather than merely parties' rights.⁵² Under English law, only in proceedings *in rem* initiated under the English admiralty jurisdiction can property dispositions by judicial sale be ordered and carried out.⁵³ Those sales have two features: first, they are intended and will actually vest clean title; second, once completed by the admiralty marshal, they usually cannot be set aside, i.e., like judgments, they are conclusive.⁵⁴ Other sales carried out in proceedings *in personam*, for instance, sales under *fiery facias*,⁵⁵ although producing *erga omnes* effects, cannot be construed as judicial sales, as in theory proceedings *in personam* do not have the authority to purge all charges attaching to ships. Regarding a foreign sale, if it wants to be given effect under the regime for recognition of judicial sales, it must contain both features of an English judicial sale.⁵⁶ Hence, this condition regarding the competence of the foreign court, in fact, limits the applicability of the recognition regime to only foreign sales constituting judicial sales, based on the notion of judicial sales as understood in English law.

The criteria for determining the nature of a sale, based on the distinction between proceedings *in rem* and *in personam*, works with no problem for the sales from common law jurisdictions, as these legal systems all have the concept of admiralty jurisdiction. However, trouble might arise when considering sales from legal systems not having admiralty jurisdiction. As shown in precedents, English judges have been divided on this matter.⁵⁷ For example, in the case *Castrique v Imrie*,⁵⁸ the

⁵⁰ *ibid.* (n 22) para 22E-057.

⁵¹ *ibid.* (n 22) para 22-058. See *Dornoch Ltd v Westminster International BV* [2009] EWHC 889, [2009] 2 Lloyd's Rep. 191.

⁵² *Castrique* (n 34) 428-429.

⁵³ Jackson (n 45) para 27.28.

⁵⁴ Roger Heward, 'England and Wales Part III. Judicial Sales of Vessels and Priority of Claims' in Christian Breitzke and Jonathan Lux (eds.), *Maritime Law Handbook* (Kluwer Law International BV 2019). Once a sale is completed by the admiralty marshal, it usually cannot be set aside.

⁵⁵ The Courts Act 2003, sch 7, para 11.

⁵⁶ That, however, does not mean the effectiveness of other sales cannot be recognised in England. As shown in *Air Foyle v Center Capital* [2002] EWHC 2535 (Comm), [2003] 2 Lloyd's Rep 753, those sales probably could be recognised according to the *lex situs* principle established in *Cammell v Sewell* (n 35) 746.

⁵⁷ Dicey et al. (n 22) 716, footnote 399 and its accompanying text.

⁵⁸ *Castrique* (n 34) 430.

English court held that a French court, which did not have the notion of proceedings *in rem*, had exercised in a jurisdiction “analogous” to the English admiralty jurisdiction, and thus the sale by the French court was a judicial sale with finality. In contrast, in adjudicating a Dutch judicial sale of an aircraft,⁵⁹ the English court refused to recognise the Dutch sale as a judicial sale, on the ground that Dutch law did not have the concept of proceedings *in rem*. The legal effects of the Dutch sale were determined according to the general principle referring to *lex situs*.⁶⁰

Third, the judgment is final and conclusive by the law of the state in which it was rendered.⁶¹ Given that the second condition limits recognisable foreign sales to judicial sales as understood in English law, the finality of foreign sales shall be assessed in terms of the features of judicial sales – if foreign sales were intended and actually transferred clean title, and those sales cannot be set aside, in their own legal systems, those sales are final and conclusive in their own legal systems. Accordingly, the judgments pertaining to those sales can be affirmed to be final and conclusive in the laws of the original states.

Fourth, the sale was not fraudulently procured. There is little doubt that fraud is a conceivable base to refuse foreign judgments.⁶² However, it is argued that whether or not fraud has a bearing upon foreign judicial sales is dubious. In *Castrique v Imrie*,⁶³ Blackburn J was unsure whether the title of a *bona fide* purchaser obtained in a judicial sale would necessarily be invalidated if the sale was procured by fraud. The distinction between general judgments and judicial sales, therefore, was drawn. Dicey, Morris and Collins follow this distinction, and justify it by emphasising that the doctrinal foundation for recognition of a foreign judgment *in rem* is the general principle that *lex situs* governs property dispositions. They suggest that the degree of recognition to be accorded to such a judgment falls to be determined almost entirely by the *lex situs*.⁶⁴ Despite these arguments, at least, one may infer that if fraud constitutes a breach of public policy or a violation of natural justice, as below stated, a foreign judicial sale will be denied recognition.

⁵⁹ The Supreme Court Act 1981, s 20. Aircrafts are subject to admiralty jurisdiction.

⁶⁰ *Air Foyle* (n 56).

⁶¹ Note that a judgment under appeal does not mean that this is not conclusive in English law terms. [Ascot Commodities NV v Northern Pacific Shipping \(The Irini A\)](#) (No. 2) [1999] 1 Lloyd’s Rep 189, [1998] 7 WLUK 48.

⁶² Dicey et al. (n 22) para 14-111.

⁶³ (n 34) 433.

⁶⁴ Dicey et al. (n 22) para 14-111.

Fifth, the sale does not offend public policy. Dicey, Morris and Collins regard public policy as a valid base for denying recognition to foreign judicial sales.⁶⁵ Although the approved objections to recognition based on public policy, to date, seem not to fit with judicial sales,⁶⁶ according to the principle that public policy varies with time,⁶⁷ objections that can be grounded in public policy may later appear.

Sixth, the sale does not violate natural justice. English natural justice refers to legal principles common to almost all nations. It may be breached by substantial irregularities in the proceeding.⁶⁸ A typical example is lack of notice. Namely, the defendant had no notice or knowledge of proceedings and thus was deprived of an opportunity to be heard.⁶⁹ It is to note that notice need not be given where the foreign law does not mandate notice to be given. In the case *Altantic Ship Supply v. M/V Lucy*,⁷⁰ a mortgagee claimed that the sale offended natural justice on the ground of lack of notice, the court held that no natural justice was breached since no notice needed to be given under the foreign law. In furtherance, common law jurisdictions regard the arrest of a ship itself as constructive notice to the world.⁷¹ Thus, even notice was not sent as provided for under the foreign law, an English court might still hold that notice was given by the arrest of the ship. Another substantial irregularity is inadequate price. A foreign sale might be denied recognition if the ship was sold at “a grossly inadequate price” lower than its “true fair market value”.⁷² Other substantial irregularities, such as an objectionable interference in the sale proceedings, or court collusion or bias,⁷³ may also substantiate persuasive objections grounded in natural justice.

After this brief investigation of English law, it seems reasonable to conclude that a sale, intended and actually producing a clean title, by a foreign court, with regard to a ship located within the territorial jurisdiction of that court at the time of sale, will

⁶⁵ *ibid.* (n 22) para 14-111.

⁶⁶ *ibid.* (n 22) 735-740 (Approved objections grounded in public policy include: family law matters not supported in English law, the judgment was rendered based on a contract executed as a result of undue influence, the judgment was obtained in disobedience of an injunction not to sue in a foreign court, and the judgment is against the Human Rights Act 1998.)

⁶⁷ *Re Macartney* [1921] 1 Ch 522, [1921] 2 WLUK 15. Castel (n 47) 107-108.

⁶⁸ Castel (n 47) 99-101; Dicey et al. (n 22) paras 14-163-165.

⁶⁹ Tetley, *Maritime Liens and Claims* (n 32) 1103, note 49 and its accompanying text.

⁷⁰ (1975) 392 F. Supp. 179 (US, M D Fla)

⁷¹ Tetley, *Maritime Liens and Claims* (n 32) 1103.

⁷² *Bollinger & Boyd v Capt. Claude Bass* (1978) 576 F. 2d 595, 598 (US, 5th Cir). Tetley, *Maritime Liens and Claims* (n 32) 1103-1104, notes 50-51 and their accompanying text.

⁷³ Myburgh (n 3) 15.

probably be recognised by an English court, to the effect that the clean and valid title is recognised.

3. Recognition of foreign judicial sales of ships in Dutch law

Dutch law divides judgments into condemnatory judgments, declaratory judgments, constitutive judgments and judgments dismissing a claim.⁷⁴ Constitutive judgments are intended to modify pre-existing legal situations and have *erga omnes* effects.⁷⁵ Usually, those judgments determine personal status or patrimonial interests. Hence, foreign judicial sales of ships are given effect under the regime for recognition of foreign constitutive judgments.⁷⁶ By recognising a foreign judgment, the title conferred by a foreign judicial sale is accepted to be valid in the Netherlands.

Dutch legislation neither allows enforcement of foreign judgments absent international treaties, nor forbids recognition of them.⁷⁷ A general rule set down by the Dutch Supreme Court is that Dutch courts have the power to determine whether and to what extent recognition can be given to foreign judgments.⁷⁸ The recognition of foreign judgments is occasionally referred to as *de facto* recognition,⁷⁹ as in principle a fresh proceeding founded on the original claim underlying a foreign

⁷⁴ Houthoff, 'Enforcement of Foreign Judgments in Netherlands' *Lexology* (26 September 2019) <<https://www.lexology.com/library/detail.aspx?g=e02f233d-8fc3-4551-9999-b387a2683368>> accessed 22 November 2021. In Dutch law, a court decision on the merits in civil or commercial matters can be qualified as a judgment.

⁷⁵ Albrecht Zeuner and Harald Koch, 'VI. Personal Limitations on Res Judicata', *International Encyclopedia of Comparative Law Online* (2010) para 133. Occasionally, legal decisions without constitutive effect are also binding the world.

⁷⁶ Dicey et al. (n 22) 716.

⁷⁷ The Dutch Code of Civil Procedure, art 431. The Netherlands is party to several treaties about recognition and enforcement of foreign judgments. See Jurjen De Korte and Geert Wilts, 'Netherlands: Enforcement of Foreign Judgments Laws and Regulations 2021' <<https://iclg.com/practice-areas/enforcement-of-foreign-judgments-laws-and-regulations/netherlands>> accessed 22 November 2021; Rolean A. G. Nicolás and others, 'Enforcement of Judgments and Arbitral Awards in the Netherlands: Overview', question 3, <[https://uk.practicallaw.thomsonreuters.com/w-024-3617?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_pageContainer](https://uk.practicallaw.thomsonreuters.com/w-024-3617?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_pageContainer)> accessed 22 November 2021.

⁷⁸ Hans Smit, 'International Res Judicata in the Netherlands: A Comparative Analysis' (1966) 16 *Buff. L. Rev.* 165, 173.

⁷⁹ Adrian Briggs, 'Recognition and enforcement of judgments (common law)', *Encyclopedia of Private International Law* (2017) 1479-1486, 1483.

judgment will be instituted.⁸⁰ Usually, when conditions for recognition are met, a simplified proceeding instead of a formal proceeding will be followed to give a Dutch judgment along the lines of the foreign judgment.⁸¹ The judgment debtor shall be heard in the recognition proceeding.⁸²

3.1 Judicial Sales of Ships Recognised as Constitutive Judgments

Since a transfer of ownership by a judicial sale is valid against the world, the judgment that orders that transfer can be categorised as a constitutive judgment. This type of judgment, which is usually issued upon payment by the purchaser within the time indicated in the conditions of sale, exists and is called different names in many legal systems, such as the UK,⁸³ Germany,⁸⁴ Italy⁸⁵ and China.⁸⁶ In the Netherlands, “a judgment of sale with the minutes of adjudication”⁸⁷ fits the description.

In the development of case law on the recognition of foreign judgments, an irrefutable rule concerning constitutive judgments has been followed since 1916, according to which “no legislation prevents the recognition of the validity of a legal situation or relation between certain parties which has been constituted by a foreign judgment or other foreign authentic instruments.”⁸⁸ That is to say, foreign judgments whereunder legal situations were constituted are entitled to recognition in the Netherlands to the effect that those legal situations will be given effect. In this sense, foreign constitutive judgments ordering the transfer of title, issued in foreign sale proceedings, are eligible for recognition in the Netherlands.

⁸⁰ Rene Ch. Verschuur, ‘Recognition and Enforcement of Foreign Judgments in the Netherlands’ in Gerhard Walter (eds.), *The Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions* (Kluwer Law International 2000) 403-425, 405.

⁸¹ *ibid.*

⁸² Korte (n 77) para 2.8.

⁸³ Heward (n 54) 13.

⁸⁴ Pötschke (n 3).

⁸⁵ Berlingieri (n 3) 7.

⁸⁶ The Regulation of the Supreme People’s Court on Auction and Sale in Civil Execution (Fa Shi [2004]16), rr 23, 29.

⁸⁷ The Dutch Code of Civil Procedure, a 575.

⁸⁸ The rule concerning the recognition of constitutive judgments was set down by the Dutch Supreme Court in a decision of 1916. See Verschuur (n 80) 406.

The doctrine which supports the granting of enforceability to foreign judgments is comity.⁸⁹ It seems reasonable to deduce that comity can also be relied on for granting recognition to judgments not susceptible of enforcement. The most prestigious formulation of comity by the Dutch scholar Ulrich Huber asserts that, under the circumstances that territorial sovereignty is respected, a nation can apply foreign laws to govern private relations insofar as it does not prejudice the power of rights of that nation.⁹⁰ There is no genuine consensus as to how or when to apply comity.⁹¹ At least, as concerned here, comity serves as the basis for recognition of foreign judgments, whether constitutive or not.

3.2 Conditions for Recognition

In the *Gazprombank* case,⁹² the Dutch Supreme Court set out five conditions for recognition of foreign judgments, briefly, being: (i) the court giving the judgment was competent in terms of international jurisdiction or generally accepted rules; (ii) the proceedings wherein the judgment was given were fair; (iii) the judgment does not offend Dutch public policy; (iv) there is no irreconcilable conflict with another judgment between the same parties and over the same cause of action; and (v) the original judgment is enforceable in its own legal system.⁹³ Apart from these conditions, in recognising a constitutive judgment, whether the applicable law for the matter decided is compatible with the Dutch conflict rules is examined (vi).⁹⁴ It is to note that objections based on fair trial (under condition (ii)) may also constitute arguments grounded in public policy (under condition (iii)).⁹⁵

⁸⁹ This is the view of the Netherlands Commercial Court, see <<https://www.rechtspraak.nl/English/NCC/Pages/enforcement.aspx>> accessed 21 March 2022.

⁹⁰ Thomas Schultz and Niccolo Ridi, 'Comity and International Courts and Tribunals', (2017) 50 *Cornell International Law Journal* 578, 582-583.

⁹¹ Comity has been criticized for being opaque. Smit (n 78) 173.

⁹² ECLI: NL: HR: 2014: 2838 (Netherlands, SC).

⁹³ The Netherlands Commercial Court lists out these conditions on its website, see <<https://www.rechtspraak.nl/English/NCC/Pages/enforcement.aspx>> accessed 22 November 2021. See also Bleyen (n 16) 93.

⁹⁴ Verschuur (n 80) 406.

⁹⁵ Fundamental principles of procedural law constitute procedural public policy. Tanja Domej, 'Recognition and enforcement of judgments (civil law)', *Encyclopedia of Private International Law* (2017) 1471-1480.

A case concluded in 2004 before the Dutch court of provisional measures⁹⁶ demonstrates how a Dutch court grants effect to a foreign judicial sale through the recognition regime for foreign constitutive judgments.

In June 2003, the ship *Hidir Selek* flying the Turkish flag, was arrested in Tianjin, a port of China, by a German bank as holder of a mortgage on her.⁹⁷ In October 2003, the Tianjin Maritime Court of China, at the application of the arrestor, ordered the ship to be auctioned on the grounds that the arrest period expired, yet the respondent failed to provide security for release, and the ship was not suitable for being indefinitely under arrest.⁹⁸ Then, the Tianjin Maritime Court adjudicated the claim over mortgage, and gave a judgment that allowed the mortgagee to be satisfied from the sale proceeds.

Later, in 2004, *Hidir Selek* was arrested in the Netherlands by her previous Turkish shipowner.⁹⁹ The previous shipowner based its claim on Dutch private international law, whereby the applicable law to determine the ship's proprietary rights was the *lex registrationis*. It was alleged by the previous shipowner that, since Turkish law mandated that a Turkish-registered ship could not be judicially sold abroad,¹⁰⁰ the Chinese judicial sale that happened in 2003 was illegal and thus, the ship's ownership had not changed. The Dutch court seized disagreed, holding that insofar as the ship was situated within China when sold, the validity of the sale and its effects on the proprietary relations regarding the ship must be determined by the *lex executionis*, Chinese law. The *lex registrationis* had no role to play in this situation. The Dutch court recognised the effects of the Chinese sale, and decreed to lift the arrest.

At the outset, the applicable law to the matters decided was examined (under condition (vi)). The Dutch court held that the *lex executionis* should be designated as applicable to govern the validity and effects of the sale as an enforcement measure. Since the ship had been arrested by the foreign court before the sale, the *lex executionis* was also the *lex situs* at the time of sale. In this sense, the conflict

⁹⁶ Rechtbank Amsterdam, 7 May 2004, KG 04/912 S&S 2007 (Netherlands, District Court of Amsterdam).

⁹⁷ (2003) Min Si Ta Zi Di No 17 ((2003)民四他字第 17 号) (China, SC). The Tianjin Maritime Court consulted the Supreme Court as to whether or not the ship should be arrested, and the latter confirmed the arrest by giving an official answer. For case facts in the Chinese trial about this ship, see < [最高人民法院关于申请释放所扣押船舶的请示的复函-找法网\(findlaw.cn\)](#) > accessed 15 November 2021.

⁹⁸ The Maritime Special Procedure Law of the People's Republic of China, s 29.

⁹⁹ Rechtbank Amsterdam, 7 May 2004, KG 04/912 S&S 2007 (Netherlands, District Court of Amsterdam).

¹⁰⁰ It was the law back then, now Turkish law allows ships of its nationality to be sold judicially abroad.

rule that *lex registrationis* governs ships' property rights shall be replaced by *lex situs* when judicial sales are considered. It is unclear whether the use of *lex situs* over *lex registrationis* only applies to dispositions by judicial sale, or this use can be extrapolated to other acts of disposition, such as expropriation and revendication.

Then, two prerequisites for recognition were assessed, viz. the jurisdiction of a foreign court (under condition (i)) and the conclusiveness of a foreign judgment (under condition (v)).

Relying on the fact that the ship was present within the foreign country's jurisdiction at the time of sale, the Dutch court confirmed the international jurisdiction of the foreign court.¹⁰¹ Apparently, Dutch courts use the ship's location as a criterion for deciding whether or not a foreign court had jurisdiction over the ship.

Although not addressed, the conclusiveness of the foreign judgment in its own legal system must have been affirmed by the Dutch court. According to the *modus operandi* of a judicial sale, a judgment ordering a title transfer becomes conclusive when the sale can no longer be set aside. The conclusiveness of a judgment, therefore, equals the finality of a sale. The question is, some legal systems allow qualified judicial sales that do not purge all charges. Do they constitute final sales that are recognisable in the Netherlands? The answer seems positive. The definition of constitutive judgments only requires the existence of a legal situation that was constituted under a judgment and has *erga omnes* effect. There are no specific requirements as to the nature of such a legal situation. Hence, on the basis that proprietary rights are of *erga omnes* effects in nature, if a change of ownership via a judicial sale is conclusive in its own legal system, that sale is final and therefore recognisable in the Netherlands. Whether or not that sale has extinguished all encumbrances on the ship does not matter in this context. In short, the finality of a foreign sale in its own legal system does not depend on the title's being clean.

Other conditions for recognition were not explicitly analysed in this case. Apart from the irreconcilable conflict between two judgments that seems impracticable to judicial sales (under condition (iv)), the remaining two conditions, public policy and fair trial, are discussed below.

As regards public policy (under condition (iii)), objections sufficient to mount to an argument of public policy include: foreign law is deemed as improper law in terms of Dutch public policy, the foreign law governs matters impossible or not allowed under Dutch law, or the recognition of a foreign judgment may impair the interests of Dutch citizens.¹⁰² Since judicial sales conducted under Dutch procedural rules

¹⁰¹ Bleyen (n 16) 94.

¹⁰² Verschuur (n 80).

produce clean title only,¹⁰³ it is not impossible that Dutch courts may regard qualified judicial sales to be irreconcilable with the fundamental values underlying Dutch law. In this case, foreign qualified judicial sales will be denied for offending public policy.

In assessing whether or not the foreign proceedings wherein the judgment was given were fair (under condition (ii)), the starting point is that whether the foreign court complied with its own procedural rules is not relevant. What is relevant is whether basic notions of fairness are breached.¹⁰⁴ As previously mentioned, the assessments concerning fair proceedings and public policy are connected. Conceivable objections based on fair proceedings include lack of notice, fraud, and undue interference of the court.¹⁰⁵

The criterion for determining lack of notice is suggested to be whether the notice was reasonably arranged in the circumstances to lead to actual notice, namely, whether parties were actually notified of the proceeding and hence able to arrange for defence.¹⁰⁶ The formal correctness in terms of either foreign procedural rules governing service or the Dutch legislation concerning service does not matter. What matters is whether or not substantial justice was maintained in practice.¹⁰⁷ Under this criterion, where a foreign country regarded the arrest of a ship as constructive notice to the world, and the court of that country did not send notice to a mortgagee in the sale proceeding, the Dutch court seized may affirm the propriety of notice, provided that the mortgagee was in practice aware of the sale and did not lose the opportunity to make a case. Whether or not the mortgagee would be entitled to notice under Dutch procedural rules is not a relevant factor to be considered.

Fraud is a generally accepted ground for refusal of recognition, and it is not necessary to be extrinsic.¹⁰⁸ Any foreign judgments fraudulently obtained cannot be recognised. Thus, if a foreign sale was procured by fraud, its subsequent judgment ordering the transfer of title cannot be recognised.

¹⁰³ In the Netherlands, a judicial sale of a ship purges all charges attaching to the ship. The Dutch Code of Civil Procedure, a 578 para 1.

¹⁰⁴ Domej (n 95) 1477.

¹⁰⁵ *ibid.* 1477.

¹⁰⁶ Smit (n 78) 192-193. Dutch authorities are ambivalent on what criteria shall be applied to determine the propriety of notice.

¹⁰⁷ *ibid.* 192; Domej (n 95) 1477.

¹⁰⁸ Smit (n 78) 193.

Undue interference of the court is widely considered as a ground for refusal.¹⁰⁹ For a judicial sale, the argument that the foreign court allowed a direct sale to a specific person without good reason may be sufficient.¹¹⁰

This brief inquiry of Dutch law shows that a judicial sale, conducted by the court of a foreign country within whose jurisdiction the ship is situated at the time of sale, according to the law of that country, will probably be recognised by Dutch courts. As the result of recognition, the purchaser's title obtained in the sale is accepted as valid in the Netherlands. Conditions to be met for recognition are those for constitutive judgments.

4. Recognition of Foreign Judicial Sales of Ships in Maltese Law

Any judgment rendered by a competent court outside Malta and having *res judicata* effect in the original state can be recognised in Malta.¹¹¹ Accordingly, if conditions for recognition are met,¹¹² foreign judgments ordering the transfer of title shall be eligible for recognition in Malta. The problem lies in one particular condition, which requires a foreign judgment invoking recognition to have applied the right law.¹¹³ Given that Maltese private international law provides Maltese law as the one and only applicable law to govern judicial sales of ships, whether domestic or not,¹¹⁴ any judgment which orders a property assignment as the effects of a sale carried out by a foreign court under its own law will in principle all be denied recognition in Malta, for wrong application of law.

Be that as it may, the effects of foreign judicial sales still can be recognised by recourse to applicable law, as shown below in case law. Accordingly, a fresh action, rather than a court application for recognition of a foreign judgment,¹¹⁵ is to be

¹⁰⁹ Domej (n 95) 1477.

¹¹⁰ A judicial sale of a ship calls for bids, and the bidder offering the highest price will have the ship. In very rare cases, the court will allow a direct sale to a defined person.

¹¹¹ The Code of Organisation and Civil Procedure, Article 826.

¹¹² *ibid.*, Article 826 (1) and 811.

¹¹³ *ibid.*, Article 811 (e).

¹¹⁴ See below section 4.1.

¹¹⁵ Thomas Bugeja and others, 'Enforcement of Judgments and Arbitral Awards in Malta: Overview', question 7 <[https://uk.practicallaw.thomsonreuters.com/1-619-2993?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a558187](https://uk.practicallaw.thomsonreuters.com/1-619-2993?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a558187)> accessed 04 April 4 2022.

instituted to adjudicate the effects of a foreign sale. In brief, Malta employs the method of material recognition to deal with foreign judicial sales.

4.1 Applicable Law to Judicial Sales of Ships

As previously mentioned, Maltese private international law follows the *lex fori* approach¹¹⁶ to determine on judicial sales of ships. The applicable law to govern judicial sales is the law of Malta. Section 37 D of the Merchant Shipping Act provides that special privileges,¹¹⁷ registered mortgages, and charges under the Civil Code, are extinguished by a “sale” pursuant to an order or with the approval of a competent court within whose jurisdiction the vessel was at the time of the sale, the interests of creditors shall pass on to the proceeds of the sale of the vessel. Both domestic and foreign sales are covered by “sale” in Section 37 D.

Regarding the type of sales covered by Section 37 D such as whether a sale ordered in a criminal or administrative proceeding is covered, this provision is broadly interpreted. However, sales by other public authorities, such as a public notary, or qualified sales that do not extinguish all charges on the ship, fall outside the scope of Section 37 D, as this provision applies only to court-ordered (approved) sales that produce clean title.

Apart from being the conflict rule for judicial sales, Section 37 D is also the norm in Maltese law that envisages legal consequences pertinent to judicial sales that will happen if certain conditions are met. The legal consequences of a sale are a clean title good against the world.¹¹⁸ There are three basic conditions to be met for obtaining that title. First, at the time of sale, the ship was situated within the foreign court’s jurisdiction. Namely, the ship was situated within the country where that court sits. Second, the foreign court has been competent to order or approve the sale. It is not clear whether the court’s competence shall be assessed in terms of Maltese law or the law of the foreign court. Third, and the most controversial, the creditors’ interests have been passed onto the proceeds. The Maltese Superior Court of Appeal interpreted this condition in a case involving the ship *Bright Star* in 2019, discussed

¹¹⁶ As opposed to the *lex causae* approach.

¹¹⁷ The Merchant Shipping Act, s 50 lists out these privileges.

¹¹⁸ Francesco Berlingieri, ‘Synopsis of the Replies from the Maritime Law Associations of Argentina, Australia, Belgium, Brazil, Canada, China, Croatia, Denmark, Dominican Republic, France, Germany, Italy, Japan, Malta, Nigeria, Norway, Singapore, Slovenia, South Africa, Spain, Sweden, America, Venezuela to the Questionnaire in Respect of Recognition of Foreign Judicial Sales of Ships’ in CMI, *Year Book 2010*, 247-384, 325.

below.¹¹⁹ The court's decision may bring repercussions to future legal practice on international recognition of judicial sales.

4.2 The Bright Star

In October 2016, a Maltese-registered ship sailed into Jamaican waters and was arrested by the local court. The Jamaican court ordered the sale of the ship, free and unencumbered, to satisfy the mortgagee who was registered in Malta and three other creditors. The successful bidder paid 10.3 million US dollars and subsequently registered the ship in Liberia under the name *Bright Star*. Notwithstanding the fact that the Jamaican court had reserved 3 million US dollars for the sole reason of satisfying the mortgagee, the said mortgagee did not pursue the deposited money in accordance with the Jamaican procedure but chose to arrest the ship later in June 2018 when she entered Maltese waters. The Maltese court confirmed the application of Section 37 D of the Merchant Shipping Act to the situation where the legal effects of a foreign judicial sale were to be determined. Given that the Jamaican court did not recognise the executive force that a Maltese mortgage had, nor the privileged ranking of the mortgagee under Maltese law, by virtue of the principle of reciprocity, the Maltese court held that the interests of the mortgagee had not been effectively passed onto the proceeds, and denied recognition to the Jamaican sale.¹²⁰

In Maltese law, the condition that the interests on the ship were passed onto the proceeds must be met for effectuating a judicial sale. Put in another way, a sale will be validated only if all charges on the ship have been purged. The doctrine of reciprocity is used by Maltese courts, as shown in the above case, as a device for deciding whether or not charges were purged when foreign sales are considered. The degree to which reciprocity is relied on is so considerable that if any Maltese right on a ship has not been given the same importance as provided for under Maltese law by a foreign court, the foreign sale may be deemed as not having purged all charges. In the case concerned, the right concerned is a mortgage; however, Section 37 D (1) governs all rights concerning a ship. Hence, other rights, e.g., a Maltese maritime lien, also may invalidate a foreign judicial sale.

In conclusion, foreign sales transferring clean title constitute judicial sales as understood in Maltese law. Since the *lex fori* approach is followed to grant effect to foreign judicial sales, the conditions in Maltese law for effectuating domestic sales must be met for validating foreign sales. In examining these conditions, Malta

¹¹⁹ Jean Pie Gauci-Maistre and others, 'Malta Overrules Foreign Auction' *The Arrest News* (April 2019).

¹²⁰ McPherse Thompson, 'Ship Auctioned in Jamaica Rearrested in Malta' *The Gleaner* (22 February 2019).

focuses on protecting creditors governed under its own law. If a Maltese court finds a Maltese right not given the same protection as provided for under Maltese law, the court may not validate a foreign sale.

5. Recognition of Foreign Judicial Sales of Ships in Chinese Law

In Chinese law, foreign judgments are recognised under the regime established by the Civil Procedure Law of the People's Republic of China (CPL)¹²¹ and the Supreme People's Court's Interpretations on Applicability of the Civil Procedure Law (SPC Interpretation).¹²² The CPL regime does not define "judgments" for the purpose of recognition and enforcement. However, based on the consistent use of terminology for the respective procedural stages of a proceeding,¹²³ one may say that judgments, as understood under the CPL regime, include only decisions on the merits in civil or commercial matters rendered by a court in the adjudication stage. Hence, decisions given in the enforcement stage are not covered. Judicial sales of ships are an enforcement measure; therefore, decisions regarding the effectiveness of these sales probably may not be categorised and recognised as judgments under the CPL regime.

The method chosen by Chinese courts to determine the effects of foreign judicial sales is the applicable law, i.e., the material recognition method. It is generally accepted that recognition of a foreign judicial sale amounts to acceptance of the validity of the purchaser's title, and a fresh proceeding has to be instituted to determine that validity.

5.1 Applicable Law to Judicial Sales of Ships

Chinese private international law invokes the *lex causae* approach to judicial sales. However, it does not treat judicial sales of ships as a legal concept or category that has a conflict rule of its own available for its determination.¹²⁴ Nor are they defined

¹²¹ Amended 27 June 2017, effective 1 July 2017.

¹²² Fa Shi [2015] 5. In Chinese law, interpretations by the Supreme People's Court have binding force on lower courts and constitute one source of law.

¹²³ In Chinese litigations, only decisions rendered in adjudication proceeding are called judgments, whereas other decisions by a court are called rulings. CPL's provisions strictly follow this terminology.

¹²⁴ Categorisation is a fundamental problem in conflict of laws systems, for an explanation of categorisation, see Dicey et al. (n 22) 38-55.

as a legal situation regarding ships' ownership that already has a conflict rule. Against this backdrop, two solutions are currently viable for finding the applicable law for judicial sales.

The first solution is to decide the applicable law governing a judicial sale by resorting to the conflict rule concerning the maritime right, which serves as the ground for initiating the recognition proceeding. Thus, under the Maritime Law of the People's Republic of China (Maritime Law),¹²⁵ a Chinese court can invoke: the *lex fori*, if a maritime lien is relied on to challenge a judicial sale; the *lex registrationis*, if a mortgage or a dispute over ownership; or, the law with the closest and most real connection, if a contractual debt, to determine the validity and effects of a judicial sale.¹²⁶ Presumably, where the purchaser of a judicial sale proactively brings an action invoking recognition of its title to the ship, the applicable law may be the *lex registrationis*. A case concluded by the Tianjin Maritime Court in 2005 followed this solution.¹²⁷

Alternatively, judicial sales can be categorised as a legal concept that is eligible for its own conflict rule, though this rule has not yet been legislated. According to the Law on Choice of Law for Foreign-Related Civil Relationships of the People's Republic of China (Law on Choice of Law),¹²⁸ the law with the closest and most real connection applies in this context. Considering the general acceptance of legal systems that *lex situs* governs property dispositions, the *lex situs* at the time of sale may be designated by Chinese courts as the applicable law to govern the validity and effects of the sale.

As far as this article is concerned, the second solution would better serve judicial sales, as it provides consistency and predictability. For domestic relations, this solution can align with the Chinese conflict rule regarding movables that refers to the *lex situs*, reducing internal incompatibilities between property law and maritime law matters.¹²⁹ For international relations, judicial sales from various countries will be governed by the same Chinese conflict rule, ensuring equal access to justice. Both internal and international harmony may be enhanced.

¹²⁵ Effective 1 July 1993.

¹²⁶ The ML, s 269 (contracts), s 270 (ownership), s 271 (mortgages) and s 272 (maritime liens).

¹²⁷ (2005) Jin Hai Fa Shang Chu Zi No 401 ((2005)津海法商初字第 401 号) (China, Tianjin Maritime Court). The decision of Chinese court was later confirmed by the Supreme Court of Eastern Caribbean, see *The Phoenix* [2014] 1 Lloyd's Rep 449 (St Vincent and the Grenadines, Eastern Caribbean Supreme Court).

¹²⁸ Effective 1 April 2011. Article 2.

¹²⁹ The Law on Choice of Law, s 37.

If the second solution purports to work better, why did the Tianjin Maritime Court follow the first in 2005? The reason may be the lack of a private international law in 2005, when cross-border private relations with reference to maritime claims were decided in accordance with the General Principle of the Civil Law of the People's Republic of China¹³⁰ and the Maritime Law. Both provide that for legal situations having no conflict rules of their own, international custom, which is notoriously hard to be substantiated in practice, can apply. The Law on Choice of Law that uses the law with the closest and most real connection to govern legal situations lacking their own conflict rules, and annuls the pertinent rules in the former two statutes referring to international custom,¹³¹ did not come into force until 2011. If the 2005 case were adjudicated now, the court might make different decisions as to what law applies.

However, it is to note that there is no guarantee as to the use of the second solution. The prerequisite for using the second solution is that the Chinese court seized must categorise judicial sales as a legal concept in its own right. In practice, Chinese courts with the power to categorise judicial sales under discretion may feel it unnecessary to resort to general statutory rules of private international law when specific conflict rules for maritime rights can be found. As a result, the conflict rules in the ML regarding maritime rights remain applicable, i.e., the first solution applies.

5.2 *The Phoenix*

In 1999, the *Phoenix* was registered in St Vincent and the Grenadines, and a mortgage was recorded there. In 2004, the ship was judicially sold in the North Korean court and subsequently sold on by the purchaser to the defendant in the later Chinese case. The defendant registered the ship in Belize and changed her name to *Union* on 7 July 2005. Later, as the ship entered the port of Tianjin, China, the mortgagee, relying on the judgment for the mortgage debt obtained in Paris, applied to the Tianjin Maritime Court for the arrest of the ship. The ship was arrested on 27 June 2005. The defendant requested the ship be released on the basis that the North Korean Judicial sale gave clean title free of all encumbrances. The Tianjin Maritime Court, by virtue of Article 271 of the Maritime Law, held that the law of the flag, i.e., the law of St Vincent and the Grenadines, should apply to decide the validity of the mortgage. However, the parties to the proceeding did not prove the foreign law to the court.¹³² That being so, Chinese law was applied instead. Then, in accordance

¹³⁰ This code expired on 31 December 2020 and has been replaced by the Civil Code of the People's Republic of China since 1 January 2021.

¹³¹ The Law on Choice of Law, s 2.

¹³² The person obliged to find foreign law is different now. The Law on Choice of Law, s 10 provides that the foreign law shall be found by the court or relevant authorities *ex officio*.

with Chinese law, the Tianjin Maritime Court gave effect to the North Korean sale and held that the mortgage claimed was purged by that sale. As to whether the North Korean sale was concluded as provided for under the law of North Korea, it was stated that owing to the sovereign principle, a Chinese court was not competent to examine the proprieties of a foreign proceeding. The ship was released after the mortgagee's claim was dismissed.

Apart from the applicable law issue, which has been mentioned above, this case discussed two conditions for recognition of foreign judicial sales when Chinese law itself is designated as the applicable law.

First, this case clarified that only foreign sales transferring clean title could be recognised as judicial sales in China. The Chinese court held that according to the Chinese procedural rules governing ship sales,¹³³ once a competent court concluded a sale, it conferred onto the purchaser a clean title. This principle was equally applied to foreign sales.

In determining whether or not the title was clean, this case seemed to demonstrate adherence to the doctrine of comity. The Chinese court did not consider how the rights on the ship would be treated under Chinese law. In furtherance, when facing arguments against procedural proprieties, the Chinese court refused to conduct an investigation into the proprieties of a foreign proceeding, asserting that sovereignty must be respected. These facts reflect that Chinese courts try to refrain from questioning, or interfering with, the law of the foreign country and the integrity of proceedings taking place before the court of that country.

Second, this case inexplicitly stated that a foreign court must have jurisdiction over the ship. The Chinese court laid stress on the fact that the ship had been situated within the territory of the foreign state throughout the sale procedure. The emphasis on the ship's location could be read as an assessment of the foreign court's jurisdiction.

In conclusion, the *lex causae* approach is followed by Chinese private international law to determine the effects of foreign judicial sales of ships. If Chinese law itself is designated as applicable, a judicial sale, transferring a clean title, conducted by the court of a foreign country within whose jurisdiction the ship was situated at the time of sale, may be validated in China.

¹³³ In 2005, the Provisions of the Supreme People's Court on the Auction of Seized Ships by Maritime Courts to Pay Off Debt (Fa Shi [1994] 14), Article 15. This statute was repealed in 2015. The current rule regarding clean title is Article 22 of the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Laws to the Arrest and Auction of Ships (Fa Shi [2015] 5).

6. Discussion

Sections 2 to 5 above examined the mechanisms in four selected legal systems for recognition of foreign judicial sales of ships. Inquiry shows that such recognition leads to acceptance of the validity and effects of a sale that was conducted in the original state. Accordingly, the purchaser's title obtained in that sale is recognised as valid in the requested state.

All four of the studied jurisdictions permit such recognition, albeit following different procedures. A recapitulation with regard to three shared elements of such recognition, viz., the method for recognition, the title or subject to be recognised, and the conditions for recognition, is given below, substantiating two propositions: (i) procedural recognition is the method by which recognition of foreign judicial sales is more feasible; (ii) recognition is not necessarily guaranteed when procedural recognition is employed, thereby the adoption of uniform rules for recognition seem appropriate.

6.1 Procedural Recognition Prevails over Material Recognition

Some states recognise foreign judicial sales of ships through their regimes for recognition of foreign judgments, namely a fixed procedure specifically designed to recognise judgments. As above discussed, this method is used in a similar manner under both, English law and Dutch law.

By recognising the judgment pertaining to a foreign sale, the transfer of ownership as a result of that sale is recognised as valid. Conditions to be met for recognition under national laws are analogous, though not identical. In particular, the ship's location at the time of the sale is examined in deciding whether or not a foreign court had international jurisdiction over the ship, and procedural irregularities offending basic notions of fairness usually constitute sufficient grounds for refusal of recognition. A noticeable difference between England and the Netherlands is what judgment is entitled to recognition – the former selects the judgment decreeing a sale, whereas the latter chooses the judgment ordering the ship's ownership to be transferred to the purchaser. This is probably due to the fact that the common law proceedings *in rem* emphasise the *res* pertaining to an action, rather than parties' rights.

Other legal systems determine the validity and effects of foreign judicial sales as matters of applicable law. Malta and China both categorise sales producing clean title as judicial sales; however, their private international laws subject judicial sales to different laws.

Maltese law invokes the *lex fori* approach, applying the law of Malta to determine the validity and effects of foreign judicial sales. One particular condition for

recognition deserves attention – all interests on the ship must have been passed on to the proceeds. If any Maltese right on a ship has not been given the same importance as provided for under Maltese law by the foreign court, a Maltese court may, relying on the doctrine of reciprocity, render a foreign sale as not having purged all charges over the ship. Consequently, no effect can be granted to that sale.

Chinese law provides a plethora of options, resorting to the *lex causae* approach according to which either the law with the closest and most significant connection or the law governing the maritime right served as a ground for challenging a judicial sale may be applied. When Chinese law itself is designated as the applicable law to govern a foreign sale, Chinese courts seem inclined to follow the doctrine of comity, refraining from interfering with the authority and effectiveness of judicial acts made by the court of a foreign country. The determination by a foreign court with jurisdiction that a sale has produced a clean title is likely to be accepted.

In terms of the *erga omnes* effect of a judicial sale, the outcome of the application of applicable law is no different from what can be obtained from the recognition of foreign judgment. However, and more to the point, a substantial distinction can actually be drawn based on predictability and certainty of results. When material recognition is followed, any surprising and unpredictable outcome may arise, as *révision au fond* is to be exercised in this situation. Apart from the noticeable conditions highlighted in this paper, in principle, any condition deemed by the court seized as relevant according to its own law may be used to invalidate a foreign sale.

Contrarily, procedural recognition, as employed by England and the Netherlands, avoids *révision au fond*, while providing fixed and limited conditions for accepting the finality and integrity of a sale made by a foreign court under its own law. Thus, the legal certainty as envisaged by reasonable persons, who engage in maritime ventures and believe in the general principle, embodied in the substantive foreign law, that a judicial sale produces a title binding everywhere, is preserved. Had *the Bright Star* been tried in England or the Netherlands, the validity of the purchaser's title might have been recognised. In addition, procedural recognition proffers predictability to purchasers seeking recognition in defined countries, as they can inquire into the rules governing the recognition, make preparations properly and save unnecessary costs.

In conclusion, compared to material recognition, procedural recognition better safeguards the certainty expected by interested parties and the predictability sought by purchasers; it is the method under which recognition is more feasible.

6.2 Is Recognition Guaranteed When the Method of Procedural Recognition is Followed?

If a state uses the method of procedural recognition, will a sale conducted by a foreign court following its own law be necessarily recognised before a court of that state? As presented below, the answer is negative.

6.2.1 Finality of a Judgment as the Title to be Recognised

This subsection discusses the title or subject to be recognised in a recognition proceeding. Two questions arise in turn: first, what type of judgment can constitute such a title; second, how to decide the finality of the judgment?

The national analysis above exhibits that a judgment whereunder a transfer of ownership is ordered constitutes the title to be recognised. This answer, however, differs from the statements of the UNCITRAL working group for a future international convention governing the recognition of judicial sales. The analysis below shows that those statements may not necessarily be correct.

In the early preparatory works of the Draft by the Comité Maritime International (CMI), the recognition of foreign judicial sales was treated as a matter of the recognition and enforcement of foreign judgments.¹³⁴ However, this approach was not followed by the UNCITRAL, which proceeded with the view that the subject of recognition was the effects of a judicial sale, i.e., a transfer of ownership, rather than a judgment underlying the sale. The UNCITRAL went on to say that an underlying judgment was a decision on the merits of a claim giving rise to a sale. Thus, such a judgment was not related to a transfer of ownership resulting from a sale. Recognition of the said judgment under the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Judgments Convention)¹³⁵ cannot lead to acceptance of the validity of the purchaser's title.

Two points in those statements seem problematic. First, the judgment pertaining to a sale is not a judgment on the merits of a claim giving rise to a sale, but a judgment ordering a change of ownership in the sale proceeding. Irrespective of its name, judgment *in rem* or constitutive judgment, a judgment of this kind commonly exists across legal systems. Second, a judgment as such decides on the merits regarding a

¹³⁴ Frank Smeele, 'Recognition of the Legal Effects of Foreign Judicial Sales of Ships', in CMI, *Yearbook 2010*, 225-235.

¹³⁵ Concluded 2 July 2019, not yet in force. Article 3 governs the definition of "judgment" (a decision on the merits given by a court), Article 4 governs the general conditions to be met for the recognition and enforcement of foreign judgments; Article 5 lists out the indirect jurisdictional grounds one of which must be found in order to make the judgment in question eligible for recognition under this convention. More details can be found in: the Hague Conference on Private International Law (HCCH), *Preliminary Document No 1 of December 2018 Twenty-second Session: Recognition and Enforcement of Foreign Judgments*.

change of ownership. Hence there exists no reason to forbid giving recognition to it. If conditions for recognition are met, it will be eligible for recognition under the Judgments Convention to the effect that the validity of the purchaser's title is accepted in the requested state. Put in another way, the UNCITRAL approach of recognition for foreign judicial sales, conceived as an international convention, may overlap with the Judgments Convention.

In brief, indeed, a judgment on the merits of a maritime claim does not order a transfer of ownership; nevertheless, the new shipowner can still have its title recognised through an application for another judgment to be recognised – a judgment issued in the sale proceeding and ordering a property assignment.

Then, the second question needs to be answered: how to decide the finality of the said judgment. Since this judgment becomes final when its pertinent sale can no longer be set aside, the finality of the judgment can be read as tantamount to the finality of the sale. Under general maritime law, the finality of a sale embodies two aspects: first, charges of whatever nature over the ship are purged; second, once completed, the sale cannot be set aside, and the title obtained by the purchaser is good as against the world. Against these two aspects, legal divergences between states are identified as follows.

English and Dutch law both submit the existence of finality regarding a foreign sale to the *lex situs* at the time of sale. In other words, whether a sale is final is subject to the law of the original state, rather than that of the requested state. However, the meaning of finality differs between these two legal systems. English law follows general maritime law in this part, and regards a sale, whether domestic or foreign, to be final when both aspects are met. Thus, a final foreign sale must produce a clean and valid title. In contrast, under Dutch law, whereas a domestic sale under Dutch procedural laws becomes final only when both aspects are fulfilled, a foreign sale seeking recognition just needs to attain the second aspect. Hence, a final foreign sale may not necessarily produce a clean title.¹³⁶

In short, a requested state first defines finality and then uses its unique definition of finality to decide whether or not a foreign sale is final in its own legal system. Given the differences in definition, even if a judgment ordering a property assignment is final by the law of the original state, recognition may still be denied to it for lacking finality.¹³⁷

6.2.2 Condition for Recognition

¹³⁶ That said, that sale may be denied recognition for violating fundamental values underlying Dutch law, i.e., offending public policy.

¹³⁷ In English law, the court seized may simply hold that a qualified sale (title not clean but valid) is not a judicial sale, therefore cannot be recognised under the regime for judgments *in rem*.

Apart from finality, five other requirements are widely considered as conditions for recognition of foreign judicial sales: the foreign court had jurisdiction, correct law was applied, there were no substantial procedural irregularities, the judgment was not fraudulently procured, and the judgment does not offend public policy. The assessments of the last three conditions may be connected.

The international jurisdiction of a foreign court must be ascertained before granting recognition to a foreign judgment. There is a unanimous agreement between the four selected legal systems that the court of a foreign country had jurisdiction over a ship if the ship was situated within the territorial jurisdiction of that country at the time of sale. The precise time of the ship's presence is loosely stated in national laws.¹³⁸ Since jurisdiction provides a valid basis for the court to proceed, the traditional common law approach to recognition of foreign judgments, which measures whether there was a territorial bond or relation between the foreign country and the persons bound by the foreign judgment when the proceedings were instituted,¹³⁹ seems suitable for judicial sales. In this sense, the exact time to decide the ship's location could be when the sale was initiated, namely the moment that an order of sale was issued. In practice, before the sale of a ship, the ship will usually be arrested by the court. As such, the ship's presence within the jurisdiction of a foreign court may not give rise to problems in the real world.

As a condition for recognition, the requirement of applicable law may have implications on persons who seek recognition in a legal system, which allows recognition of constitutive judgments but does not apply the *lex situs* to govern judicial sales. Maltese law provides an example. Malta uses a regime analogous to that in the Netherlands for recognition of judgments ordering property assignments. Both states require a foreign judgment to have applied the correct law. The problem lies in the fact that Maltese private international law invokes the *lex fori*, i.e., Maltese law, to deal with judicial sales. Hence, any foreign judgment issued under its own law will be deemed to have applied the wrong law. Any *prima facie* viable regime under which a judgment ordering a property assignment can be recognised may turn out to be impracticable, owing to its peculiar test regarding the applicable law. Nevertheless, as the applicable law requirement is being systematically removed from legal systems,¹⁴⁰ this condition should be excluded from the recognition proceedings of judicial sales.

Substantial procedural irregularities provide a ground for refusal of recognition. Acceptable objections of this kind include lack of notice, undue interference of the court, and inadequate price. Despite the similarities in name and content, these

¹³⁸ Jackson (n 45) para 27.46. This is also true for the other three jurisdictions studied in this article.

¹³⁹ Briggs, 'Recognition' (n 79) 1484.

¹⁴⁰ Domej (n 95) 1478.

objections may be assessed by divergent criteria in different legal systems. Fraud is another valid ground for refusal. While there is no doubt in both English and Dutch law that judgments fraudulently procured are impeachable, English law scholars feel hesitant about invalidating the title of a *bona fide* purchaser on the basis of fraud. Public policy is a term of broad content. When serving as a ground for refusal, any circumstances that violate the fundamental values underlying the law of the requested state, including procedural irregularities and fraud, may be deemed to offend public policy.

As above shown, apart from the jurisdiction requirement, the determination of other conditions may be subject to different criteria in various legal systems following procedural recognition models. For a party seeking recognition of a judicial sale in a defined jurisdiction, the mere fact that that jurisdiction has a procedure in place for recognising foreign judgments means that it cannot guarantee the recognition of that sale. Varying objections that may successfully invalidate a foreign sale will be presented and examined in requested states, which will apply their respective criteria for assessing the integrity of a foreign judicial act.

As it stands, it is submitted that international uniform rules governing recognition seem to be appropriate in the first place. In order to facilitate recognition of judicial sales, probably, an international recognition model, based on unanimous agreements on the meaning of finality, explicitly setting out the conditions for recognition, and taking into consideration the possible crossover between this model and the Judgments Convention, shall be considered and worth to strive for.

7. Conclusion

The fact that the certainty of the title obtained in judicial sales benefits the well-being of maritime trade and thus shall be maintained is now a prevailing view in the community of nations. Notwithstanding, states follow divergent national regimes to give effect to such title, exacerbating legal uncertainty.

The procedural recognition method avoids *révision au fond* and provides a fixed set of rules, thus safeguarding certainty and predictability of results. It is the method by which recognition is more feasible and hence, the method advocated by the authors. Be that as it may, procedural recognition cannot necessarily guarantee recognition. Notwithstanding a common subject of recognition, i.e., a judgment ordering a transfer of ownership, the national regimes based on procedural recognition apply different specific rules. The finality of a judgment has varying definitions; in tandem with it, despite the similarities in name and conceptual content, the conditions for recognition are assessed against various criteria. An objection that cannot invalidate

a foreign sale in one legal system may nevertheless be a sufficient ground for refusal of recognition in another.

In view of these findings, it is submitted that in order to safeguard the finality and integrity of judicial sales, an international uniform recognition approach is needed. This uniform approach must avoid *révision au fond*, have an agreed definition of finality, and set forth explicit conditions for recognition. Besides, possible conflicts between this approach and the Judgments Convention shall be considered and addressed with caution.

Paper 3

Allanando el camino para el reconocimiento de las ventas judiciales de buques celebradas en el extranjero. Análisis comparado de los procedimientos de venta judicial en jurisdicciones seleccionadas

Paving the way to recognising foreign judicial sales of ships: a comparative analysis of judicial sale proceedings in selected jurisdictions

Paper 3 Yingfeng Shao, Laura Carballo Piñeiro and Maximo Q. Mejia. Jr., 'Paving the Way to Recognising Foreign Judicial Sales of Ships: A Comparative Analysis of Judicial Sale Proceedings in Selected Jurisdictions' (2023) 15 Cuadernos de Derecho Transnacional 136.

Resumen: El reconocimiento de la venta judicial de buque en el extranjero depende de las normas de derecho internacional privado del país donde se pretende su reconocimiento que, como es sabido, suele examinar diversos requisitos. Como quiera que los mismos están influenciados por las normas que rigen los procedimientos internos, este artículo realiza un análisis de derecho comparado en diversas jurisdicciones para comprender mejor cómo funcionan los mecanismos de reconocimiento de este tipo de ventas. De él se desprende que, al menos, seis aspectos reciben un tratamiento diferente dependiendo de la jurisdicción examinada. De ellos, cuatro son susceptibles de reaparecer en el momento del reconocimiento poniendo en peligro la libre circulación del título de comprador del buque, esto es, la localización del buque en el momento de la venta, en qué condiciones se notifica, las divergencias en la venta estándar y la protección adicional otorgada a los acreedores privilegiados en la distribución del producto. En cambio, cuestiones como en qué momento iniciar una venta y cómo conseguir el mejor precio posible, aunque sustancialmente divergentes, no suelen ser obstáculo al reconocimiento.

Palabras clave: buques, ventas judiciales, normas de procedimientos de venta judicial, reconocimiento de la venta judicial de un buque en el extranjero

Abstract: The extent to which a state will recognise the effects of a foreign judicial sale of a ship is subject to its private international law rules, which consist of various conditions for recognition. The application of these conditions may be mediated by the principles informing domestic sales. Thus, to understand better how national recognition mechanisms work, this article undertakes a comparative legal analysis of sale proceedings in selected jurisdictions to examine whether these principles fundamentally diverge and may impair the recognition. Varying principles exist as regards six aspects of the sale proceeding. In light of the prevailing conditions for recognition of foreign judicial sales, it is inferred that the principles concerning four sale aspects may resurface at the recognition stage, putting in danger the free circulation of the ship purchaser's title. These four sale aspects include the ship's location, the notification of sale, the variance in the standard sale, and the extra protection given to high-ranking creditors in the distribution of proceeds. In contrast, the principles in respect of the remaining two sale aspects, viz., the time to initiate a sale and the approach to obtaining the best possible price, though substantially divergent, may not impede the recognition.

Keywords: Ships, judicial sales, principles informing sale proceedings, recognition of foreign judicial sales

Sumario: I. Introduction. II. Divergences and convergences in sale proceedings across jurisdictions. 1. Conditions for initiating a judicial sale. A) What is a ship for judicial sale purposes. B) Who can initiate a sale before which public authority. C) Ship arrest before the sale. 2. Preparations for the sale. A) Service of the documents concerning the sale. B) Appraisal, publication and notification. 3. Concluding the sale. A) Sale by a public authority. B) Court-approved private sale. C) Stopping the sale. 4. After the sale: priority and payout. III. Discussion: relevance to the recognition of foreign judicial sales. IV. Conclusion.

I. Introduction

1. "Recognition of foreign judicial sales is an essential part of the theory, practice and integrity of maritime liens, mortgages and other charges against a ship."¹ Absent recognition of the validity and effects of judicial sales, maritime privileges on ships cannot function properly. On the one hand, lacking confidence that the title conferred by sale in one state will be recognised wherever the ship goes,

¹ W. TETLEY / R.C. WILKINS, *Maritime Liens and Claims*, International Shipping Publications, 1998, p. 1119.

potential bidders would not offer a market price for the ship, reducing the possibilities of creditors being sufficiently paid out of the sale proceeds.² On the other hand, one legal system might resurrect the privileges on the ship, which were purged by sale in another, bringing legal uncertainty to the parties engaging in maritime ventures.³

2. Considering the importance of recognition of judicial sales, the United Nations Commission on International Trade Law (UNCITRAL) has been deliberating over a future international convention governing the international effects of judicial sales since 2019.⁴ The UNCITRAL wishes that a uniform and simple solution could be established to facilitate the free circulation of the purchaser's title to the ship obtained from a judicial sale.

3. The extent to which a state will recognise foreign judicial sales is subject to its private international law rules.⁵ Since these rules intend to further the considerations and aims upon which domestic maritime law rules are built,⁶ their application may be mediated by the legal principles embedded in the sale procedural rules under domestic law. Accordingly, recognition will be denied, if a foreign sale is not in line with what the requested state considers fundamental legal values.

4. Notice requirements provide an example. English law follows the principle that ship arrest constitutes constructive notice to the world. Thus no notification of sale will be given to the creditors on the ship unless they have intervened or entered cautions.⁷ In contrast, Dutch law follows the principle that an advertisement cannot replace the actual notification to interested parties. Hence, a forthcoming sale must be notified to the creditors known.⁸ These divergences might be referred to by an English or Dutch court when recognising a foreign sale, for instance, being

² Comité Maritime International (CMI), *Yearbook 1985 Lisboa I*, p. 46.

³ W. TETLEY / R.C. WILKINS, *Maritime Liens and Claims*, International Shipping Publications, 1998, pp. 1098-1100; Y. SHAO / L. CARBALLO PIÑEIRO, "Towards a Harmonised Approach to the Recognition of Foreign Judicial Sales of Ships Through Conventions Addressing Maritime Liens and Mortgages", *Il diritto marittimo*, 2021, pp. 736-761.

⁴ Documents about the progression of this draft can be found on the website of the UNCITRAL: main page – working documents – Working Group VI <https://uncitral.un.org/en/working_groups/6/sale_ships> accessed 28 October 2021.

⁵ For a synopsis of the recognition of foreign judicial sales, see Y. SHAO / L. CARBALLO PIÑEIRO / M. Q. MEJIA, JR., "Recognition of Foreign Judicial Sales of Ships and Private International Law", *JIML*, vol. 28, 2022, pp. 166-186.

⁶ S. BRÆKHUS, «Choice of Law Problems in International Shipping (Recent Developments)», *Collected Courses of the Hague Academy of International Law*, vol. 164, pp. 259-260.

⁷ See Section 2.

⁸ *ibid.*

employed as criteria for deciding whether or not natural justice or fair proceedings have been breached.⁹

5. Do sale proceedings and their underlying principles differ greatly in other essential matters, such as whether a ship arrest shall precede the sale, or when can a sale be initiated? More importantly, whether and how will those differences affect the recognition of foreign judicial sales? To answer such, an exploration of sale proceedings seems entailed.

6. This article hence examines the legal divergences and convergences of sale proceedings in four legal systems: English, Dutch, Maltese, and Chinese law. In this way, jurisdictions rooted in common and civil law traditions, and representing mixed and Asian legal systems, are all probed, enabling a comprehensive comparative legal study regarding judicial sales of ships. The following section examines the national procedural rules on judicial sales, followed by a section identifying and comparing the legal principles underlying these rules. The relevance of the identified principles to the recognition of foreign judicial sales is also discussed. This article finalises with some conclusions. Maritime claims are excluded from this research which only concerns the sale procedure. No private international law rules regarding the existence and ranking of maritime claims are referred to either. Besides, only sea-going ships are concerned.

II. Divergences and convergences in sale proceedings across jurisdictions

7. The judicial sale of a ship is an enforcement measure that realises the value of the defendant's asset to satisfy a claim in relation to the ship or the shipowner. As averred by David C Jackson, judicial sales are a remedy determinative of substantive issues, as opposed to an interim remedy, such as ship arrest.¹⁰ This section chronologically outlines the procedural stages of a sale, *i.e.*, from initiating the sale to distributing the sale proceeds.

⁹ Y. SHAO / L. CARBALLO PIÑEIRO / M. Q. MEJIA. JR., "Recognition of Foreign Judicial Sales of Ships and Private International Law", *JIML*, vol. 28, 2022, pp. 166-186.

¹⁰ D. C. JACKSON, *Enforcement of Maritime Claims*, Informa Law from Routledge, 2005, ch. 25.

1. Conditions for initiating a judicial sale

8. Three basic conditions must be met before a sale can be commenced: (i) there is a ship subject to a sale; (ii) the applicant is entitled to commence a sale; (iii) and the ship is arrested prior to the sale.

A) *What is a ship for judicial sale purposes*

9. Ships are a transportation mode known to all. However, the asset that constitutes a ship for enforcement purposes varies from state to state.

10. English law does not have a definition of a ship for the purpose of arrest and sale, but a general definition of a ship can be found in the precedents and legislation concerning admiralty jurisdiction. “Used in navigation” is employed as the criterion for deciding whether or not a craft is a ship.¹¹ “Used in navigation” embodies two aspects: first, the water where the craft is used, is navigable;¹² second, the craft is capable of making ordered progression on the water from one point to another for discharging people or cargoes at the destination.¹³ Meeson and Kimbell emphasise the importance of Section 1(1) of the Merchant Shipping Act 1921, whereby “a lighter, barge or like vessel used exclusively in non-tidal waters, other than harbours, shall not for the purpose of this Act, be deemed to be used in navigation.”¹⁴ In other words, boats exclusively used on inland waters are not ships for the purpose of arrest and sale.

11. The Netherlands sets out a sweeping definition of ships, which applies to judicial sales.¹⁵ All things, except for aircraft, that according to their construction

¹¹ The Senior Court Act 1981, s 24(1); the Merchant Shipping Act 1995, s 313. See N. MEESON / J. KIMBELL, *Admiralty Jurisdiction and Practice*, 5th ed, Informa Law from Routledge, 2017, paras 2.6 & 2.9.

¹² *The Mayor & Corporation of Southport v Morriss* [1893] 1 QB 359 (A sheet of water half a mile long could not be considered navigable); *Weeks v Ross* [1913] 2 KB 229 (Although the water on which the ship was used was short in the mile, the canal itself which included the concerned water was not enclosed but communicated to the sea via locks).

¹³ *R v Goodwin* [2006] 1 WLR 546; [2006] 1 Lloyd’s Rep 432. *Steedman v Scofield* [1992] 2 Lloyd’s Rep 163 (In these two cases, a jet ski was considered not to be a ship); *Polpen Shipping Company Ltd v Commercial Union Assurance Company Ltd* [1943] KB 161 (A flying boat was not a ship); *Curtis v Wild* [1991] 4 All ER 172 (Navigation referred to proceeding from one point to another for the purpose of discharging people or cargo at the destination. If the ship was used for mere pleasure purposes in a reservoir, it was not used in navigation).

¹⁴ N. MEESON / J. KIMBELL, *Admiralty Jurisdiction and Practice*, 5th ed, Informa Law from Routledge, 2017, para 2.28.

¹⁵ L. BLEYEN, *Judicial Sales of Ships: A Comparative Study*, Springer, 2016, p. 74.

are intended for floating, and do float or have floated, are ships.¹⁶ Thus, vessels under construction,¹⁷ floating hulks (shipwrecks),¹⁸ jet skis¹⁹ and boats used in inland navigation, all of which may be denied as ships in English law, constitute ships under Dutch law. Note that a foreign sea-going ship, of which the gross volume is less than 20, or the gross tonnage is less than 6, or in the case of a ship under construction, which is not registered in the public register, shall otherwise be sold in the manner for general movables.²⁰

12. Maltese law does not define ships for judicial sales²¹ but has a definition for general purposes. Article 2 of the Merchant Shipping Act (Maltese MSA)²² employs “used in navigation” as the criterion for deciding whether or not a thing is a ship.²³ This provision, however, goes on to say that floating establishments or structures, and ships under construction, are also ships.²⁴ Thus, despite the identical words, “used in navigation” has different connotations in Maltese and English laws. It is unclear whether ships used in inland waterways are “used in navigation”. Given that the Maltese MSA is “based originally on the English merchant shipping legislation,”²⁵ it seems reasonable to infer that they may not be ships, provided that no explicit clarification exists in Maltese law for the time being.

13. Chinese law defines ships in the Maritime Law of the People’s Republic of China (Chinese ML),²⁶ whereby vessels no less than 20 gross tonnage and mobile at sea constitute ships.²⁷ Namely, vessels under construction which are not mobile, vessels used in inland navigation, and fixed establishments floating on water, cannot

¹⁶ Book 8 of the Dutch Civil Code, effective 1 April 1991, a 1 (1). Hereinafter referred to as Dutch book 8.

¹⁷ The Dutch Code of Civil Procedure, effective 29 March 1828, a 562a. Hereinafter referred to as Dutch CCP. Compare N. MEESON / J. KIMBELL, *Admiralty Jurisdiction and Practice*, 5th ed, Informa Law from Routledge, 2017, para 2.27.

¹⁸ *European and Australasian Royal Mail v P. & O.* (1866) 14 LT 704.

¹⁹ *R v Goodwin* [2006] 1 WLR 546; [2006] 1 Lloyd’s Rep 432. *Steedman v Scofield* [1992] 2 Lloyd’s Rep 163.

²⁰ Dutch CCP, a 576.

²¹ J. SCERRI-DIACONO / others, “The Meaning of ‘Ship’ in Judicial Sales in Malta”, *JIML*, vol. 25, 2019, pp. 156-160.

²² Chapter 234 of the Laws of Malta, effective 6 April 1973. Hereinafter referred to as Maltese MSA.

²³ Maltese MSA, s 2.

²⁴ *ibid.*

²⁵ R. COLES and E. WATT, *Ship Registration: Law and Practice*, 2nd ed, Informa, 2009, para. 19.2.

²⁶ Effective 1 July 1993. Hereinafter referred to as Chinese ML.

²⁷ Chinese ML, a 3.

be categorised as ships. This definition is partly in line with the pertinent provisions in the Special Maritime Procedure Law of the People's Republic of China (Chinese SMPL)²⁸ and its interpretation (Interpretation of Chinese SMPL)²⁹ that crafts under 20 gross tonnage are not ships for maritime sale purposes. They shall be sold following the procedures for general movables.³⁰

14. Based on the above, one may say that any craft used at sea and able to discharge people or cargoes at the destination constitutes a sea-going ship susceptible to a judicial sale. Additionally, it is to note that ships used in public service will usually be granted immunity from arrest or judicial sale.³¹

B) Who can initiate a sale before which public authority

15. To commence a judicial sale, some legal systems require the creditor to obtain an enforceable title. Other states, however, do not regard an executive title as an indispensable precondition. Instead, a sale before judgment, *i.e.*, a sale *pendente lite*, is viable.

16. In English law and those following English maritime legislation,³² a sale may be petitioned by any party at any stage³³ in an action *in rem*,³⁴ which is against the ship and initiated by issue of a claim form.³⁵ Under English law, actions *in rem* must be brought before the Admiralty Court of the Queen's Bench Division of the High Court.³⁶ Admittedly, it is common for the court to sell the arrested ship after a

²⁸ Effective 1 July 2000. Hereinafter referred to as Chinese SMPL.

²⁹ Fa Shi [2003] 3. Hereinafter referred to as Interpretation of Chinese SMPL.

³⁰ Interpretation of Chinese SMPL, a 39.

³¹ What constitutes public service varies between states and deserves a detailed discussion in its right; however, this falls outside the inquiry concerned here, so no further will be discussed. For details, see as follows: for English law, the State Immunity Act 1978, a 10; for Dutch law, Dutch CCP, a 436; for Maltese law, the Code of Organization and Civil Procedure, a 863; for Chinese law, Chinese ML, a 3. Besides, both the Netherlands and the UK are member states to the International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels, signed at Brussels, April 10th 1926, and Additional Protocol, signed at Brussels, May 24, 1934 (176 LNTS 199). Article 3 of this convention sets out what ships are entitled to immunity from seizure, arrest or detention.

³² Such as Singapore, Malaysia, Brunei and India. They all allow sales *pendente lite* in actions *in rem*, see L. TEC, "Judicial Sale of Vessels in Asia-Pacific Common Law Jurisdiction", in CMI, *Yearbook 2013*, pp. 150-166.

³³ The Civil Procedure Rules 1998, r 61.10. Hereinafter referred to as English CPR.

³⁴ The Senior Court Act 1981, s 20.

³⁵ English CPR, r 61.3.

³⁶ English CPR, r 61.2(1).

judgment on the merits is rendered,³⁷ but by virtue of the inherent jurisdiction of the Admiralty Court,³⁸ a sale *pendente lite* may also be approved by the court. When a creditor petitions a sale before judgment, a certificate proving proper service of the claim form and an affidavit setting out the grounds for the application must be submitted.³⁹

“Good reason” for sale must be substantiated in order for the court to order a sale pending action. In deciding on “good reason”, the admiralty judge seized⁴⁰ would consider the following matters. First, is there a claim to the satisfaction of the court?⁴¹ Second, will the value of a ship be diminished by continuous arrest over a long period to the detriment of all parties, if a sale is not ordered?⁴² Third, whether a judgment in default can be obtained, *i.e.*, whether or not at the date on which the judgment is entered an acknowledgement of service or defence has been filed.⁴³ If an action is defended, the court should review the application for sale more critically than it normally would in a default action.⁴⁴

³⁷ Note that English CPR, r 61.5(1) allows an arrest both before and after judgment. This rule reverses the leading precedent *The Alletta* ([1974] 1 Lloyd’s Rep 40), which mandated that the creditor’s right of arrest was lost once the claim was merged into the judgment. At present, English law follows the decision of the Singapore High Court in *The Daien Maru* ([1986] 1 Lloyd’s Rep 387), which held that if no bail had been provided for the ship in the action, the creditor would be entitled to arrest the ship in the same action after obtaining the judgment.

³⁸ The power of the court in this matter is supplemented by Rule 25.1 of the English CPR, which governs the interim remedy by sale with respect to the perishable property. See N. MEESON / J. KIMBELL, *Admiralty Jurisdiction and Practice*, 5th ed, Informa Law from Routledge, 2017, para. 4.125.

³⁹ A. MANDARAKA-SHEPPARD, *Modern Admiralty Law*, Cavendish Publishing, 2001, p. 139.

⁴⁰ English PD, r 61.9.3. A sale prior to a judgment may only be ordered by the admiralty judge. It implies that a sale after a judgment may be ordered by either the admiralty judge or the admiralty registrar. The respective responsibilities of the admiralty judge and the admiralty registrar can be found on the website of the Admiralty Court, <<https://www.gov.uk/courts-tribunals/admiralty-court>> accessed 23 May 2022.

⁴¹ *The Hercules* (1885) LR 11 PD 10.

⁴² *The Myrto* [1977] 2 Lloyd’s Rep 243.

⁴³ English CPR, r 61.9 (1).

⁴⁴ *The Myrto* (n 42).

17. Dutch law, like most civilian jurisdictions,⁴⁵ provides that a judicial sale shall be initiated in virtue of an enforceable title.⁴⁶ The bailiff of the district court within whose competence the ship is situated⁴⁷ has the power to arrest the ship for enforcement purposes,⁴⁸ *i.e.*, executive arrest.⁴⁹ Then, in principle, the civil law notary will conduct the sale. Alternatively, in the case of a foreign-flagged ship, the district court which arrested the ship can conduct the sale upon the application by a creditor.⁵⁰

Since a debtor is liable for a claim against it with all its assets,⁵¹ the enforceable title must be against the shipowner or secured by a privilege in relation to the ship. Instruments that constitute enforceable titles include judicial decisions rendered by courts, authentic acts with enforceability clauses, and other documents designated by law as enforceable titles.⁵² Notably, a mortgage established according to Dutch law, *i.e.*, in the form of a notarial deed that is inscribed in the public register, is an enforceable title.⁵³

18. Maltese law requires an enforceable title for initiating a judicial sale⁵⁴ but permits sales *pendente lite* in exceptional cases.⁵⁵ A judicial sale as an enforcement

⁴⁵ For example, Germany, Italy and Belgium. For German law, see J. ERIK PÖTSCHKE, «Judicial Sale of Ships in Germany as an Example for a Civil Law concept», in CMI, *Yearbook 2013*, pp. 143-150. For Italian law, see G. BERLINGIERI, «Italy Part III. Judicial Sales of Vessels and Priority of Claims», in C. BREITZKE / J. LUX (eds.), *Maritime Law Handbook*, Kluwer Law International BV, 2019. For Belgian law, see L. BLEYEN, *Judicial Sales of Ships: A Comparative Study*, Springer, 2016, pp. 44-47.

⁴⁶ Dutch CCP, a 430.

⁴⁷ The competence of a district court in relation to an executive arrest is not clear under Dutch law. Nevertheless, the court within whose competence the ship is expected to enter or is located is competent to order a conservatory arrest, and a conservatory arrest may be followed by execution. In this vein, in practice, the court within whose competence a ship sits is competent to order the executive arrest of that ship. See L. BLEYEN, *Judicial Sales of Ships: A Comparative Study*, Springer, 2016, p 71.

⁴⁸ Dutch CCP, a 563.

⁴⁹ As opposed to precautionary arrest.

⁵⁰ Dutch CCP, aa 570 & 575.

⁵¹ Dutch Book 3, s 3.9.4 (Mortgage).

⁵² Dutch CCP, a 430.

⁵³ Dutch Book 3, a 268.

⁵⁴ The Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta), effective 1 August 1855, aa 252, 260. Hereinafter referred to as Maltese COCP.

⁵⁵ Note that although Malta has the concept of *in rem* jurisdiction under which a ship may be arrested as security for a claim *in rem*, a precautionary arrest is also viable *in personam* proceedings. See

measure⁵⁶ is ordered and carried out by the court which delivered the judgment, or by the court competent to take cognisance of the ship when other executive titles are enforced.⁵⁷

Article 253 of the Code of Organization and Civil Procedure (Maltese COCP) sets out the instruments that can be enforced, including court decisions, notarial deeds, promissory notes and others. In addition, registered mortgages established according to the Maltese MSA constitute enforceable titles.⁵⁸ When the court is satisfied that the debtor is insolvent or otherwise unlikely to be able to continue trading and maintaining the asset, it may, upon the application of a creditor, order the sale of the arrested ship *pendente lite*.⁵⁹ Apart from financial status, other factors that must be considered include the nature of the claim, the defence raised against the claim, and steps taken by the debtor to secure the claim or preserve the asset.⁶⁰

19. In Chinese law, any creditor of an enforceable title can apply for an order of sale;⁶¹ in tandem with it, a sale *pendente lite* can be petitioned in any maritime claim⁶² before a maritime court.⁶³ The maritime court that arrested the ship shall order and conduct a judicial sale.⁶⁴ If the creditor of a judgment rendered by a district court applies for a judicial sale before that court,⁶⁵ that court must entrust the maritime court, within whose competence the ship registration port sits, or the

K. DINGLI / T. GRECH, “Ship Arrest in Malta”, < <https://shiparrested.com/wp-content/uploads/2016/04/MaltaSAP.pdf>> accessed 23 May 2022.

⁵⁶ As opposed to a precautionary measure.

⁵⁷ Maltese COCP, a 264.

⁵⁸ Maltese COCP, a 253; Maltese MSA, a 42(2).

⁵⁹ Maltese COCP, a 864.

⁶⁰ *ibid*, a 864.

⁶¹ The Supreme People's Court's Interpretation on the Application of the Civil Procedure Code of the People's Republic of China, amended 10 April 2022, a 484, hereinafter referred to as Interpretation of Chinese CCP.

⁶² Chinese SMPL, s 21; Interpretation of Chinese SMPL, a 15. There are twenty-two maritime claims that must be filed before a maritime court. They are identical to those listed in Article 1 of the International Convention on Arrest of Ships, 1999 (2797 UNTS 3).

⁶³ In China, there are eleven maritime courts separately located in different provinces.

⁶⁴ Regarding an arrest prior to an action, the competent maritime court for arrest is that within whose competence the ship is situated. In contrast, an arrest after an action has no geographical restrictions over the maritime court. Chinese SMPL, ss 13, 29.

⁶⁵ In general enforcement, a judgment or ruling shall be enforced by the court of first instance, which rendered it, or the court of first instance, within whose governance the property is situated. The Code of Civil Procedure of the People's Republic of China, amended 1 January 2022, a 231. Hereinafter referred to as Chinese CCP.

ship is situated, to carry out the arrest and sale.⁶⁶ District courts are not competent to levy execution upon ships.

Enforceable titles under Chinese law comprise judgments, court rulings, arbitral awards, and other legal documents,⁶⁷ such as a notarial deed that contains enforceability clauses.⁶⁸ If the shipowner or other interested parties fails to provide security for release within the fixed period for arrest, which is 30 days,⁶⁹ and the ship is not suitable for continuously being under arrest, the arrestor can apply to the court that arrested the ship for the ship to be sold *pendente lite*.⁷⁰ Or, if the arrestor does not petition such, the debtor can apply for a sale *pendente lite* after commencement of an action.⁷¹ The court will examine with caution the grounds for the application.⁷² Only if the ship may cause a hazard to the safe navigation, the defendant disappears or evades the action or cannot repay the debt, or the diminishing of the value of the ship under arrest is substantial, the court may render the arrest improper and thus order a sale.⁷³

20. As a general insight, it seems not easy for a creditor to obtain a *sale pendente lite*. Before acceding to the sale application, the court will examine all facts relevant to the sale application, particularly the claim's merits and the ship's status. A sale pending judgment may be ordered only in cases where a purportedly valid claim is not defended, the debtor's solvency is in doubt, and the value of the ship under arrest keeps decreasing considerably. A sale pending action is more like an exception than a routine. As a corollary, a sale *pendente lite* may not necessarily make the jurisdictions which allow it more advantageous than those denying it, as a strict and lengthy review will take place.⁷⁴

C) Ship arrest before the sale

⁶⁶ Interpretation of Chinese SMPL, a 15.

⁶⁷ Chinese SMPL, s 22.

⁶⁸ Chinese CCP, a 238; the Provisions of the Supreme People's Court on Several Issues Concerning the Handling of Enforcement Objection and Review Cases by the People's Courts (Fa Shi [2015] 10), a 22.

⁶⁹ Chinese SMPL, s 28.

⁷⁰ *ibid*, s 29.

⁷¹ Interpretation of Chinese SMPL, a 30.

⁷² Chinese SMPL, s 30.

⁷³ L. ZHANG, *Ship Arrest and Relevant Issues*, Law Press China, 2009, pp. 151-153. See also the Guidance of Auction Work of the Nan-jin Maritime Court, s 2. <[南京海事法院 《南京海事法院船舶拍卖工作指南》 \(njhsfy.gov.cn\)](http://njhsfy.gov.cn)> accessed 4 July 2022. Hereinafter referred to as the Nan-jin Maritime Court Guidance.

⁷⁴ L. BLEYEN, *Judicial Sales of Ships: A Comparative Study*, Springer, 2016, p. 130.

21. The ship shall be in the hands of the authority which is to conduct the sale. To this end, typically, the sale is preceded by a ship arrest.

22. In English law, to obtain an order of sale, the ship must be under arrest in the action in which the sale petition is filed. If the ship has been arrested in another action, it has to be arrested again in this action.⁷⁵ Once an action *in rem* is instituted, the claimant may apply for a warrant of arrest.

The warrant is executed by service of the warrant on the property, and the service must be effected by the admiralty marshal or its substitute.⁷⁶ If service of the warrant is not reasonably practicable, the arrest may also be effected by service of a notice of the issue of the warrant in the same manner, or giving notice of the arrest to those in charge of the property.⁷⁷

The marshal is responsible for the custody of a ship. As the custodian, the marshal is expected to keep the ship safely under arrest and unable to depart unlawfully, meanwhile incurring the least possible expenditure in performing its duty.⁷⁸ Note that the marshal's custody does not replace the shipowner's duty of control of the ship. Where the case seems appropriate, the marshal may remove vital components of the ship, notify the port authority, or employ watchmen for an uncrewed ship.⁷⁹ Expenses incurred in doing such must be advanced by the arrestor through its solicitors.⁸⁰ Where the cost has not yet been recovered from the arrestor, the marshal may directly claim it from the sale proceeds upon application to the court.⁸¹

23. Under Dutch law, the ship to be judicially sold shall be under executive arrest.⁸² The arrest is effected by means of a warrant of arrest,⁸³ which states, among

⁷⁵ *The Wexford* (1883) 13 PD 10.

⁷⁶ English CPR, r 61.5.8.

⁷⁷ English PD, r 61.5.5.

⁷⁸ *The Westport (No.2)* [1965] WLR 871. Otherwise, the marshal may be accused of depleting the proceeds.

⁷⁹ R. HEWARD, «England and Wales Part III. Judicial Sales of Vessels and Priority of Claims», in C. BREITZKE / J. LUX (eds.), *Maritime Law Handbook*, Kluwer Law International BV, 2019, pp. 5-6.

⁸⁰ In applying for arrest, the claimant must give an undertaking as to advance any expenditure in the arrest, custody and sale. English PD, r 61.5.1.

⁸¹ R. HEWARD, «England and Wales Part III. Judicial Sales of Vessels and Priority of Claims», in C. BREITZKE / J. LUX (eds.), *Maritime Law Handbook*, Kluwer Law International BV, 2019, p. 6.

⁸² L. BLEYEN, *Judicial Sales of Ships: A Comparative Study*, Springer, 2016, p. 79.

⁸³ Dutch CCP, a 565.

others, details of the ship, the enforceable title, and information of the executor.⁸⁴ The warrant shall be inscribed in the Dutch public registry if the ship is registered there.⁸⁵

The arrest is completed by the bailiff on board the ship.⁸⁶ Two particular situations deserve mentioning. First, if the ship is already under precautionary arrest, from the moment the creditor obtains an enforceable title, the precautionary arrest converts into executive arrest.⁸⁷ Second, when there is a link between the Netherlands and the claim, the ship can be placed under executive arrest when it is not within the territorial jurisdiction of the Netherlands.⁸⁸ Accordingly, in the context of a Dutch mortgage, the ship may be held under executive arrest by execution of a leave provided by a Dutch court. That leave is granted upon a petition to take control of the ship on account of a taking control clause, as stipulated in the mortgage notarial deed.⁸⁹

The master is responsible for the ship under arrest unless the bailiff appoints a custodian.⁹⁰ The custodian may be liable for negligence in its custody, although the custodian is not obliged to stay on board the ship.⁹¹ The bailiff may take necessary measures to prevent the ship from fleeing or to preserve the ship, such as repairs, removal of an essential part of the engine, or sending notice of the arrest to the port authority.⁹² The costs resulting from these measures can be claimed from the sale proceeds with a high priority.⁹³

24. In Maltese law, a ship to be arrested and sold shall physically be located within the territory of Malta.⁹⁴ To keep the ship within the territory throughout the

⁸⁴ *ibid*, a 565 para 1.

⁸⁵ *ibid*, a 566. Any encumbrance or administration effected after the registration of the warrant cannot be invoked against the arrestor.

⁸⁶ *ibid*, a 564.

⁸⁷ *ibid*, a 704.

⁸⁸ L. BLEYEN, *Judicial Sales of Ships: A Comparative Study*, Springer, 2016, p. 77.

⁸⁹ [D. V. BEMMEL](https://langeaarklinkhamer.com/en/the-enforced-sale-sea-going-vessels-the-netherlands/), “The Enforced Sale of Sea-going Vessels in the Netherlands”, <<https://langeaarklinkhamer.com/en/the-enforced-sale-sea-going-vessels-the-netherlands/>> assessed 21 June 2022

⁹⁰ Dutch CCP, a 564 (2). In practice, the custodian appointed is usually the master.

⁹¹ L. BLEYEN, *Judicial Sales of Ships: A Comparative Study*, Springer, 2016, p. 81.

⁹² *ibid*; Dutch CCP, a 564 (3).

⁹³ *ibid*; Dutch book 8, a 211.

⁹⁴ F. BERLINGIERI, «Synopsis of the Replies from the Maritime Law Associations of Argentina, Australia, Belgium, Brazil, Canada, China, Croatia, Denmark, Dominican Republic, France, Germany, Italy, Japan, Malta, Nigeria, Norway, Singapore, Slovenia, South Africa, Spain, Sweden, America, Venezuela to the Questionnaire in Respect of Recognition of Foreign Judicial Sales of

enforcement proceeding, an executive arrest will usually be ordered upon the application by the executor. When a petition is made for such issue of an executive warrant of arrest, the court will either order the sale or fix a time limit within which the debtor shall pay the amount due.⁹⁵

The executive warrant is executed by serving it on the executive officer of the authority which has the ship in its hands or under its control.⁹⁶ If the ship is already under precautionary arrest, the precautionary warrant remains in force for 15 years after the cause becomes *res judicata*.⁹⁷ In that case, the court may directly issue an order of sale upon the application by the executor.⁹⁸

The shipowner is responsible for the ship under arrest. Where appropriate, the transport authority in whose hands the ship is attached may intervene and take necessary measures to preserve the arrested ship.⁹⁹ For example, if a ship is uncrewed, the transport authority may supply crew members to assist the ship.¹⁰⁰ The arrestor will advance the costs incurred and then recover from the sale proceeds.¹⁰¹

25. Under Chinese law, in order for a maritime court to sell a ship in enforcement proceedings, the ship must be under executive arrest.¹⁰² The arrest is effected by means of a warrant of arrest.¹⁰³ The warrant usually states the enforceable title, the parties' information, and the ship's particulars. Normally, the court will send notice of the warrant to the ship registry, requesting assistance from the latter.¹⁰⁴

Ships», in CMI, *Year Book 2010*, pp. 247-384, question 2.1 (Malta). Hereinafter referred to as Malta's Reply to the Questionnaire of CMI.

⁹⁵ Maltese COCP, a 388 D.

⁹⁶ *ibid*, a 856 (2).

⁹⁷ *ibid*, a 838B (1).

⁹⁸ *ibid*, a 313.

⁹⁹ *ibid*, a 857 (4).

¹⁰⁰ "Ship Arrest For Seafarers' Wages in Malta", < https://seafarersrights.org/legal_database/ship-arrest-for-seafarers-wages-in-malta/> accessed 6 June 2022.

¹⁰¹ Maltese COCP, a 857 (4).

¹⁰² Chinese SMPL, s 29; Interpretation of Chinese CCP, a 484.

¹⁰³ Interpretation of Chinese CCP, a 484.

¹⁰⁴ Upon receiving such a notice, the ship registry will thereafter refuse to change the records of the ship arrested. The Provisions of the Supreme People's Court on Several Issues Concerning the Application of Laws to the Arrest and Auction of Ships (Fa Shi [2015] 6), a 1. Hereinafter referred to as Chinese Provisions on Arrest and Sale.

The warrant is executed by the bailiff, who will complete the arrest on board the ship.¹⁰⁵ If the ship is already under precautionary arrest, the precautionary arrest converts into executive arrest from the moment the enforcement proceedings are commenced.¹⁰⁶

The shipowner or bareboat charter is responsible for the custody of the ship under arrest. If they refuse to fulfil their obligations, the court may appoint the arrestor or a third party as the custodian. The expenditures incurred thereof shall be borne by the shipowner or bareboat charterer, or claimed from the sale proceeds.¹⁰⁷

26. This enquiry shows that, generally, a ship shall be under arrest before a judicial sale. One notable difference among jurisdictions, however, exists on what action constitutes an arrest for enforcement purposes. English, Maltese and Chinese laws concur that the arrest of a ship means that the ship is physically in the hands of the court. Namely, the arrested ship must stay within the territory of the state arresting it. Dutch law, on the other hand, provides that when a Dutch mortgage is to be enforced, the ship can be held under executive arrest even if the ship's presence is not within the Dutch territory. It indicates that a Dutch court may assert jurisdiction to dispose of a ship based on its artificial *situs*, rather than physical *situs*.¹⁰⁸

2. Preparations for the sale

27. The authority conducting the sale, whether a court or any other competent authority, must make some preparations for the sale. This section examines three vital ones: service of the documents concerning the sale, appraisal of the ship's value, and publication and notification of the sale.

A) Service of the documents concerning the sale

28. Certain documents are served before the sale takes place, to guarantee that the parties with interests on the ship are given access to justice. Depending on the

¹⁰⁵ On grounds of difficulty, the court may resort to the port authority, the police or the border control for assistance.

¹⁰⁶ The Provisions of the Supreme People's Court on Several Issues Concerning the Property Preservation by the People's Courts (Fa Shi [2016] 22), a 17, hereinafter referred to as Chinese Provisions on Property Preservation.

¹⁰⁷ Chinese Provisions on Arrest and Sale, a 7.

¹⁰⁸ For a discussion on the relationship between movable dispositions and the *res situs*, see A. V. DICEY / others, *Dicey, Morris & Collins on the Conflict of Laws*, 15th ed., Sweet and Maxwell, 2015, para. 22-058.

law of the state conducting the sale, these documents may be the *in rem* claim form, the enforceable title, the command of payment, the warrant of arrest, and the order of sale.

29. Under English law, two documents must be served prior to a judicial sale, *viz.*, the *in rem* claim form that initiates the action *in rem* in which the ship can be arrested and sold, and the notice of an application to the court for sale. The claim form may be served by anyone, as long as service is effected in the correct manner; however, it may not be served out of the jurisdiction.¹⁰⁹ Anyone may accomplish the service: by fixing a copy of the claim form on the outside of the property in a conspicuous position that may be seen; where there is a notice against arrest, on the person stated in the notice as being entitled to receive service; in any other manner as the court may direct if the property to be arrested is within the territory.¹¹⁰ The sale application notice shall be served on the parties to the claim,¹¹¹ persons who lodged cautions against release, and the admiralty marshal.¹¹²

30. In Dutch law, there are two documents that the bailiff must serve before a judicial sale – a command of payment and, if the ship is not under precautionary arrest, a warrant of arrest. The creditor with an enforceable title shall first instruct the bailiff to serve the command of payment, which demands the debtor to fulfil its obligation within 24 hours, on the shipowner, or in the case of a shipping company, on the accountant.¹¹³ If the debt is not satisfied in time, the arrest warrant will be issued.¹¹⁴ The warrant shall be served on the shipowner or its accountant, and the debtor if different from the shipowner.¹¹⁵ When the shipowner or its accountant is unknown, service can be effected by giving the warrant to the master, skipper, or deputy. Where these persons are also unknown, service can be achieved by leaving a copy of the warrant on the ship.¹¹⁶ Additionally, after the warrant is inscribed in

¹⁰⁹ *The Good Herald* [1987] 1 Lloyd's Rep 236. N. MEESON / J. KIMBELL, *Admiralty Jurisdiction and Practice*, 5th ed, Informa Law from Routledge, 2017, para. 4.16.

¹¹⁰ English PD, r 61.3.6.

¹¹¹ Includes those who intervene in the claim to protect their interests in the *res*, see N. MEESON / J. KIMBELL, *Admiralty Jurisdiction and Practice*, 5th ed, Informa Law from Routledge, 2017, para. 4.71.

¹¹² English PD, r 61.9.1.

¹¹³ Dutch CCP, a 563; Dutch Book 8, a 178. If the competency of the accountant of the shipping company (the administrator of the shipowners society) is explicitly limited in the Dutch Trade Registry, the command of payment cannot be served on the accountant. See L. BLEYEN, *Judicial Sales of Ships: A Comparative Study*, Springer, 2016, pp. 79-80.

¹¹⁴ Dutch CCP, a 565.

¹¹⁵ *ibid*, a 565 para 3.

¹¹⁶ *ibid*, a 565 para 4.

the Dutch public registry,¹¹⁷ the warrant shall be served on the registered mortgagees within four days after registration.¹¹⁸

31. In Maltese law, three documents may be served before a judicial sale: a command of payment (intimation of payment), the notice of a sale application, and an executive warrant of arrest, or in the case of the ship under precautionary arrest, an order of sale. Judgments can be enforced two days from delivery; no commands of payment are in need.¹¹⁹ Other enforceable titles, however, cannot be enforced until the lapse of at least two days from the service of command of payment on the debtor.¹²⁰ Although no legislation provides such, the sale application notice will normally be served on the shipowner and other arrestors. In addition, the debtor is expected to send notice of the sale application to the registered mortgage.¹²¹ After issuing the executive warrant of arrest, a copy of the warrant shall be served on the debtor,¹²² the shipowner if it is not the debtor, the master or other person in charge of the ship, or the agent of the ship.¹²³ In the case of an order of sale, a copy of the order will be served on the debtor or its lawful representative.¹²⁴ In principle, service is effected by the court officer. Nevertheless, in the context of ship arrest, the person indicated by the arrestor may be designated by the court to effect service.¹²⁵

32. Under Chinese law, three documents will be served prior to a judicial sale, *viz.*, a command of payment (a notification of enforcement), a warrant of arrest if the ship is not under precautionary arrest, and an order of sale. If the debtor does not perform its obligations under an enforceable title, the creditor can apply to the court for enforcement of the title.¹²⁶ Upon receipt of such an application, the court shall issue and serve the command of payment on the debtor, demanding the debtor to pay the debt within a fixed period.¹²⁷ If the debt is not paid on time, the arrest

¹¹⁷ *ibid*, a 566.

¹¹⁸ *ibid*, a 67 (1).

¹¹⁹ Maltese COCP, a 256 (1). On grounds of urgency, the court may abridge these periods of time, Maltese COCP, a 257.

¹²⁰ The creditor will file an intimation, known as a judicial letter, against the debtor, before the competent court, demanding satisfaction in accordance with the enforceable title. The judicial letter will be served by the court on the debtor. Maltese COCP, a 256 (2).

¹²¹ Malta's Reply to the Questionnaire of CMI, question 2.4.

¹²² Maltese COCP, a 278 (1).

¹²³ *ibid*, a 856 (3).

¹²⁴ *ibid*, a 278 (1).

¹²⁵ The Maltese Act No.XXXI of 2019, a 9; Maltese COCP, a 856 (3).

¹²⁶ Chinese CCP, a 243.

¹²⁷ Interpretation of Chinese CCP, a 480.

warrant,¹²⁸ followed by the sale order, will be served on the debtor,¹²⁹ or the master if different from the claimant.¹³⁰

33. This enquiry finds both divergences and convergences between jurisdictions as regards service. Regarding convergences, it is a shared rule that the shipowner, and the debtor if different from the shipowner, shall always be alerted to the upcoming sale. They are thus given a chance to stop the sale, for instance, by meeting the debt, if they wish so.

34. Two divergences are observed. First, the person responsible for the service duty varies. English law allows any party to effect service, whereas the Netherlands and China permit only court officers. Maltese law is flexible to the extent that both court officers and the persons designated by the parties can effect service in the context of ship arrest. Second, apart from the executor, the creditors who are entitled to receive service diverge. In a Maltese sale, all arrestors will be, and registered mortgagees might be served with a notice of the sale application. In Dutch law, the arrest warrant will be served on registered mortgagees. Under English law, the sale application notice will be served on the persons who entered caveats. Chinese law does not require any creditors to be served with any document at this stage. That said, they will otherwise be notified of the sale at the later notification stage, as stated below.

35. One may wonder what will happen if the creditors who have received official documents do not immediately intervene in the sale proceeding. Two scenarios may come up. First, the sale goes on, and then these creditors participate in the distribution process. Second, these creditors await until the notification stage and oppose the sale if they find the conditions, time, place, *etc.* of the sale inappropriate, as discussed below. In short, these creditors will not lose their right to obtain payment out of the proceeds nor the opportunity to oppose the sale.

B) Appraisal, publication and notification

36. The upcoming sale shall be advertised to the public and divulged to the relevant parties. In some states, this entails an appraisal of the value of the ship.

37. In English law, an appraisal, usually by the shipbroker appointed by the marshal, must be made to prevent the ship from being sold at an unreasonably low price. The appraised value shall not be disclosed to anyone other than the marshal

¹²⁸ In practice, the court has the power to order only the arrest of a ship, and then with the consent of the creditor, direct the debtor to fulfil its obligations within a fixed time. Thus, an executive arrest is not always followed by a judicial sale. Interpretation of Chinese CCP, a 484.

¹²⁹ The Provisions of the Supreme People's Court on Several Issues Concerning the Enforcement by the People's Courts (Trial Implementation) (Fa Shi [1998] 15), r 24.

¹³⁰ Interpretation of Chinese SMPL, a 54.

at the preparation stage.¹³¹ After appraisalment, the shipbroker immediately drafts and publishes an advertisement for the sale, which is about to take place in 3 or 4 weeks.¹³²

The advertisement of sale will, in principle, be repeated after its first appearance and include what follows: the ship's main characteristics; the marshal's conditions of sale, including that the ship is to be sold "as is where is"; the form of sale, usually by private treaty; and, information concerning the inspection of the ship.¹³³ Commercial ships are at all times advertised in "Lloyd's List".¹³⁴ A copy of the sale conditions is available at the shipbroker.

The shipbroker will notify the plaintiff and cautioners against release of the ship by sending a copy of the advertisement.¹³⁵ The other creditors shall assume the responsibility to keep themselves informed of what happens to the ship. Hence no notification will be given to them.¹³⁶

38. Dutch law does not mandate the ship to be appraised. In the conditions of sale, drafted by the executor's lawyer and approved by the authority for sale, what follows will be stated: whether there is a minimum price, whether the ship is sold free from encumbrances, the security to be provided by potential bidders, the risk in the transfer of ship, and that the sale is "as is where is".¹³⁷ A copy of the sale conditions can be obtained from the sale authority.¹³⁸

If the sale is before a notary, the notary shall determine the place and time for sale within fourteen days of its appointment,¹³⁹ and the advertisement will be made per the customs of the place where the ship is under arrest, at least fourteen days

¹³¹ N. MEESON / J. KIMBELL, *Admiralty Jurisdiction and Practice*, 5th ed, Informa Law from Routledge, 2017, para 4.105.

¹³² R. HEWARD, «England and Wales Part III. Judicial Sales of Vessels and Priority of Claims», in C. BREITZKE / J. LUX (eds.), *Maritime Law Handbook*, Kluwer Law International BV, 2019, p. 10.

¹³³ *ibid*, p. 8

¹³⁴ *ibid*, p. 11.

¹³⁵ Explanation of the concept of caution against release, can be found in N. MEESON / J. KIMBELL, *Admiralty Jurisdiction and Practice*, 5th ed, Informa Law from Routledge, 2017, paras. 4.93-96.

¹³⁶ R. HEWARD, «England and Wales Part III. Judicial Sales of Vessels and Priority of Claims», in C. BREITZKE / J. LUX (eds.), *Maritime Law Handbook*, Kluwer Law International BV, 2019, p. 11.

¹³⁷ Dutch CCP, aa 570 & 517 (2).

¹³⁸ *ibid*, aa 570 & 517 (2).

¹³⁹ *ibid*, a 570.

before the sale takes place.¹⁴⁰ If the ship is foreign-flagged, upon an application of the notary or the executor, the provisional measures judge can designate one or more newspapers of that foreign country in which the advertisement is to be published, and increase the fourteen days.¹⁴¹ Apart from newspapers, the advertisement shall also be posted at the places where the ship is under arrest and where the sale will happen.¹⁴² If the executor can apply to the district court for the ship to be sold before a judge, the judge will determine the time and date for sale.¹⁴³ The sale cannot take place before thirty days have elapsed since: (i) the executor files to the court the sale conditions, (ii) the validity of advertisement and notification is declared by the bailiff or the executor's lawyer, and (iii) a list of known creditors and arrestors is submitted by the executor's lawyer to the court.¹⁴⁴

The advertisement of sale will include the following matters: the name of the notary or judge who is in charge of the sale, the name and address of the executor, the enforceable title, the underlying claim, the names of the shipowner and the debtor, the particulars of the ship, and the time and place of sale.¹⁴⁵

Notification of the sale will be made. In the context of a notary sale, the notary shall inform the shipowner, arrestors and other known creditors by sending a copy of the sale conditions, at least thirty days before the sale takes place.¹⁴⁶ In the case of a judge sale, the executor shall immediately inform the rightful claimants and arrestors in writing of the time and place of the sale.¹⁴⁷

39. Under Maltese law, in the auction of movables,¹⁴⁸ including ships, an appraisal may be made if required by the creditor or the debtor,¹⁴⁹ and no minimum price is required for ship auctions.¹⁵⁰ A ship auction cannot be held in public; the

¹⁴⁰ *ibid*, a 571.

¹⁴¹ *ibid*, a 571.

¹⁴² *ibid*, a 572.

¹⁴³ *ibid*, a 575.

¹⁴⁴ *ibid*, a 571.

¹⁴⁵ *ibid*, a 572.

¹⁴⁶ *ibid*, aa 570, 517 (1) & 515 (2).

¹⁴⁷ *ibid*, a 575.

¹⁴⁸ Except for those consisting of gold or silver articles, pearls or precious stones or of other precious articles. Maltese COCP, a 315 (1).

¹⁴⁹ Maltese COCP, a 315 (2).

¹⁵⁰ This rule shall apply to ships and other vessels exceeding 10 meters in length. Small ships which have been appraised will have a minimum price, which is not less than 60% of the value appraised, in an auction. Maltese COCP, a 319 (5).

court shall give such directions as it may deem proper for disposal of the ship in the manner most advantageous to the interested parties.¹⁵¹

The court registrar regularly publishes the list of judicial auctions in two newspapers, one being in Maltese and the other in the language of English. The advertisement usually includes the date and place of sale, the ship's particulars, and the enforceable title.¹⁵² Additionally, the debtor, creditor or any other interested person may publish and inform, at their own expense, any particular sale in any newspaper or broadcast the same over any other broadcasting medium.¹⁵³

The court is not bound to inform any known creditors of the time and place for the auction. That said, the executor has served the sale application on all arrestors, and the debtor possibly has informed registered mortgagees of the sale underway.¹⁵⁴ As such, at least these parties could track down the sale's time and place in the newspaper.

40. In Chinese law, the temporary auction committee, formed by the maritime court which arrested the ship,¹⁵⁵ shall make an appraisal to establish the minimum price.¹⁵⁶ At present, almost all judicial auctions take place online. According to the Supreme People's Court's Provisions on Several Issues Concerning Online Judicial Auctions by People's Courts (Chinese Provisions on Online Auctions),¹⁵⁷ the minimum price will be published as the starting price for the sale.¹⁵⁸

The sale advertisement shall be published in a newspaper or any other medium for three consecutive days, at least thirty days before the sale date. Foreign-flagged ships shall be advertised in a newspaper or any other medium that is circulated abroad.¹⁵⁹ The advertisement will include, among others, the ship's particulars, the enforceable title, the time and place of sale, and how to file notice of claims against

¹⁵¹ Maltese COCP, a 314 (2).

¹⁵² Malta's Reply to the Questionnaire of CMI, question 2.1.

¹⁵³ Maltese COCP, a 313.

¹⁵⁴ Malta's Reply to the Questionnaire of CMI, questions 2.2-2.4.

¹⁵⁵ Chinese SMPL, s 34. Note that the minimum price may be further reduced if no bidder is offered and the first auction fails, see Subsection 2.3.1.

¹⁵⁶ Chinese Provisions on Arrest and Sale, a 11.

¹⁵⁷ (Fa Shi [2016] 18), hereinafter referred to as Chinese Provisions on Online Auctions.

¹⁵⁸ Chinese Provisions on Online Auctions, aa 10 and 14: the starting price must be published as part of the conditions of online auction, and it shall be more than 70% of the appraised price. These provisions are in conflict with Article 12 of the Chinese Provisions on Arrest and Sale, whereby the minimum price remains confidential.

¹⁵⁹ Chinese SMPL, s 32; Interpretation of Chinese SMPL, a 31.

the proceeds.¹⁶⁰ Additionally, on the internet platform where the auction is to take place, the advertisement shall be posted, together with other information designated by law, fifteen days before the auction occurs.¹⁶¹ The said information can be categorised into two types, *viz.*, those concerning the property¹⁶² and those describing the rules of the auction.¹⁶³

The court will require the executor to provide information regarding the known maritime lien, the registered mortgagee¹⁶⁴ and the shipowner.¹⁶⁵ These parties and the ship registry will be notified in writing of when and where the sale will happen, as well as other facts about the sale, thirty days before the sale takes place.¹⁶⁶

41. It is found that a proper advertisement is entailed worldwide, and the information incorporated in the advertisement is similar. Appraisal, however, is treated differently between jurisdictions. England and China mandate the appraisal of the ship's value, whereas Malta allows but does not demand

¹⁶⁰ *ibid*, s 32.

¹⁶¹ There are five accredited platforms for judicial auctions at present, comprising both commercial ones, such as Taobao, and judicial ones, for instance, the People's Court Litigation Property Website. <[最高人民法院关于司法拍卖网络服务提供者名单库的公告 - 中华人民共和国最高人民法院 \(court.gov.cn\)](#)> accessed 8 June 2022.

¹⁶² Chinese Provisions on Online Auctions, a 13: (1) the advertisement, (2) the legal documents ordering the execution, except for those that cannot be made public according to the law; (3) a copy of the evaluation report; (4) the auction time, starting price and bidding rules; (5) a text description of, videos or photos of the current status of the property's ownership, possession and usufruct; (6) the right of pre-emption and the nature of the right; (7) circumstances where the parties and the known pre-emption rights holders have been notified or not; (8) the auction deposit and payment methods; (9) The taxes and fees that may arise from the transfer of the property and the way to pay them; (10) the name of the enforcement court, contact information and supervision methods, etc.; (11) other information that should be published.

¹⁶³ Chinese Provisions on Online Auctions, a 14: (1) the bidder shall have full capacity for civil conduct, and where laws, administrative regulations and judicial interpretations have special requirements on the qualifications or conditions of the buyer, the bidder shall meet the required qualifications or conditions; (2) if one entrusts others to bid, one shall be permitted by the people's court before the bidding procedure starts, and the network service provider shall be notified; (3) known defects and encumbrances on the auctioned property; (4) the property is subject to its actual status, and bidders may apply for on-site inspection of it; (5) if the bidder decides to participate in the bidding, it shall be deemed to have a complete understanding of the auction property and accept all known and unknown defects in the auction property; (6) the auction confirmation bill stating the true identity of the buyer is to be published on the online platform; (7) the deposit will not be refunded where the buyer regrets the auction.

¹⁶⁴ In legislation, there is no qualification upon the mortgagee entitled to notice. However, in practice, usually only the mortgage registered in China is considered.

¹⁶⁵ Interpretation of Chinese SMPL, a 34.

¹⁶⁶ Chinese SMPL, s 33.

appraisal. The Netherlands permits the executor to propose the minimum price, implying that the executor shall appraise the ship (if necessary).

42. As regards notification, the creditors who are not the executor but nevertheless entitled to a notice of the sale differ from one state to another. In English law, a copy of the advertisement will be given to the persons who lodged cautions. In Chinese law, the essential information in the sale conditions must be given to registered mortgagees and known maritime lienees. Dutch law further requires all known creditors to be given the date and time of sale. Malta seems liberal in this respect, but in combination with the service requirements, as discussed previously, arrestors and registered mortgagees are probably aware of the upcoming sale. In light of these statements, it is submitted that the principle that arrest is constructive notice to the world,¹⁶⁷ as followed by English law, may be unacceptable to legal systems like China and the Netherlands, where known creditors must be given actual notice of the time and place of sale.

3. Concluding the sale

43. The judicial sale takes place accordingly after advertisement and notification. Where applicable, a court-approved private sale producing the same effects may be made.

A) Sale by a public authority

44. A judicial sale in England is usually concluded by private treaty, which means that potential buyers submit written tenders on the prescribed form to the marshal's broker by noon on the appointed day.¹⁶⁸ The tenders will not be opened until the deadline expires, and the highest tender will be accepted. Typically, per the marshal's conditions of sale, the successful bidder must pay a deposit of 10% within 48 hours and the balance in a further seven days. Upon adequate payment on schedule, the marshal issues a bill of sale certifying the transfer of a clean title. Besides, the broker delivers the documents and certificates of the ship seized onboard to the buyer. The sale is final and not subject to appeal.¹⁶⁹

¹⁶⁷ W. TETLEY / R.C. WILKINS, *Maritime Liens and Claims*, International Shipping Publications, 1998, p. 1103.

¹⁶⁸ In rare cases the marshal may sell by public auction. N. MEESON / J. KIMBELL, *Admiralty Jurisdiction and Practice*, 5th ed, Informa Law from Routledge, 2017, para. 4.108.

¹⁶⁹ R. HEWARD, «England and Wales Part III. Judicial Sales of Vessels and Priority of Claims», in C. BREITZKE / J. LUX (eds.), *Maritime Law Handbook*, Kluwer Law International BV, 2019, p. 13.

The marshal cannot conclude a sale at a price less than the appraised value unless otherwise ordered by the court.¹⁷⁰ If no tender submitted is at or higher than the appraised value, the marshal will divulge the appraised price and the highest bid to the executor and all cautioners against release, and then seek instructions from the court. In this case, the marshal may recommend re-sale or accepting the current highest tender.¹⁷¹ If a creditor insists on a fresh sale despite that the court is unconvinced of the possibility of attaining a higher price, the court may allow so if the creditor can provide an indemnity for future losses caused by the price difference.¹⁷²

45. The Netherlands conducts a judicial sale by auction in a public hearing.¹⁷³ The auction is done first by bidding and then by decreasing. Namely, in the first part of the auction, prospective buyers make increasingly higher bids, whereas, in the second part, the judge or notary sets a price higher than the highest bid in the first part and then gradually reduces the price until a bidder says “mine”, or the reduced price reaches the previous highest price. The notary or judge will notify the debtor and known creditors of the sale conclusion. The successful bidder must pay the price following the conditions of sale to the notary, judge, or appointed custodian.¹⁷⁴ After payment, a notarial deed of adjudication¹⁷⁵ or a judgment of sale with minutes of adjudication,¹⁷⁶ declaring a transfer of the ship’s ownership free from encumbrances, will be issued to the purchaser.¹⁷⁷ Once adjudicated, the sale is final.¹⁷⁸ Note that if the price is not sufficiently paid, the executor can have a re-auction at the cost of the defaulting purchaser.¹⁷⁹

Divergent statements exist on the effects of an auction. Some assert that a judicial auction gives a clean title, as according to Article 578 (2) of Dutch CCP, all

¹⁷⁰ *The Halcyon the Great (No.2)* [1975] 1 Lloyd’s Rep 525.

¹⁷¹ R. HEWARD, «England and Wales Part III. Judicial Sales of Vessels and Priority of Claims», in C. BREITZKE / J. LUX (eds.), *Maritime Law Handbook*, Kluwer Law International BV, 2019, p. 12.

¹⁷² *Halcyon* (n 177).

¹⁷³ Dutch CCP, a 570.

¹⁷⁴ *ibid*, a 575. Note that if the ship is under 20 cubic meters gross volume and under 6 cubic meters gross tonnage, the sale has to be done in the same manner as for general property (Dutch CCP, a 576).

¹⁷⁵ *ibid*, a 570.

¹⁷⁶ *ibid*, a 577.

¹⁷⁷ *ibid*, a 578 (2).

¹⁷⁸ *ibid*, aa 570 (2) & 575 (6).

¹⁷⁹ *ibid*, a 577.

preferential claims and attachments on the ship are purged by auction.¹⁸⁰ Others aver that certain rights can be invoked against the successful purchaser, accordingly, a Dutch judicial auction does not necessarily confer a clean title. These arguments against a clean title refer to the right of retention as an example.¹⁸¹

As far as this article is concerned, in the current Dutch law, whether a shipyard maintains its right of retention on a ship when the ship goes through a judicial auction remains in abeyance.¹⁸² Regarding the usufruct on a ship, although it can be invoked irrespective of the change of ownership,¹⁸³ one can presume that a ship arrest will frustrate the enjoyment of the usufructuary upon the ship. As such, the usufruct cannot be maintained in a judicial sale. Anyhow, based on the positive wording of Article 578 (2) and the Dutch jurisprudence, one may expect a clean title to be conferred by auction.

46. In Maltese law, a ship is judicially sold by a public auctioneer in the presence of the court registrar.¹⁸⁴ The auction is not in public but takes place in a manner that is the most advantageous to the interested parties with due respect to the sacred nature of the object to be sold by auction.¹⁸⁵ The purchaser shall pay the price to the court within seven days from the day of the final adjudication for sale.¹⁸⁶ Then, a bill of sale (*procès-verbal*) will be issued declaring the completion of the sale, particularly its effects being the transfer of the ship's ownership free from

¹⁸⁰ L. BLEYEN, *Judicial Sales of Ships: A Comparative Study*, Springer, 2016, p. 90; [D. V. BEMMEL](#), "The Enforced Sale of Sea-going Vessels in the Netherlands", <<https://langelaarklinkhamer.com/en/the-enforced-sale-sea-going-vessels-the-netherlands/>> assessed 21 June 2022.

¹⁸¹ Van Steenderen Mainport Lawyers, "First-step Analysis: Shipping Law and Practice in Netherlands", *Lexology* (1 August 2019) <<https://www.lexology.com/library/detail.aspx?g=4f4aa193-b949-4e88-878c-fdcdd2a13523>> assessed 22 June 2022.

¹⁸² H. V. D. H. V. OORDT / others, "Appeal Court Partially Restores Retention Rights for Dutch Shipyards", *Lexology* (7 October 2015) <<https://www.lexology.com/commentary/shipping-transport/netherlands/akd/appeal-court-partially-restores-retention-rights-for-dutch-shipyards>> assessed 22 June 2022.

¹⁸³ "Limited Real Rights" <<http://www.dutchcivillaw.com/content/dutchcivillaw022.htm>> assessed 22 June 2022.

¹⁸⁴ Maltese COCP, a 315 (2).

¹⁸⁵ *ibid*, a 314 (2).

¹⁸⁶ *ibid*, a 328.

encumbrances.¹⁸⁷ In default of payment, the court may make the defaulting purchaser liable to personal arrest,¹⁸⁸ and order a re-auction at his or her expense.¹⁸⁹

47. Under Chinese law, a ship is usually judicially auctioned on a designated online platform. Within the time of auction, any qualified bidder¹⁹⁰ can submit tenders.¹⁹¹ The auction shall be concluded even if there is one tender, as long as it is not less than the minimum price.¹⁹² A confirmation letter of sale conclusion will automatically be produced and posted online.¹⁹³ The successful purchaser shall pay the price to the court within the days as specified in the sale advertisement, usually seven days from the date of the sale conclusion.¹⁹⁴ After that, the court will arrange the ship's delivery and announces the auction and delivery in the newspaper.¹⁹⁵ A court ruling affirming the auction will be given to the purchaser within ten days of sufficient payment. Upon receipt of this ruling, the purchaser obtains the ship's clean title, and the sale becomes final.¹⁹⁶

If the first auction fails, the court will conduct two more auctions consecutively on the same platform.¹⁹⁷ In the second auction, the court may reduce the starting price to the extent that the reduction is less than 20% of the starting price. If it fails, a third auction can be made with a starting price which is not less than 50% of the appraised price. Should the third auction continue to fail, the ship can be sold by the court to a designated person at a fixed price more than 50% of the appraised price. If such a sale still cannot be achieved, with the consent of the creditors whose collective interests are more than 2/3 of the total interests of the claims filed to the

¹⁸⁷ *ibid*, a 347; Maltese MSA, s 37D.

¹⁸⁸ *ibid*, a 329 (1).

¹⁸⁹ *ibid*, a 329 (2).

¹⁹⁰ Any bidder shall pay a deposit, which is between 5% and 20% of the starting price as decided by the court, to the account of the court, or to the payment system of the online service provider. After the sale is concluded, the successful bidder's deposit automatically becomes part of the price, while others' deposits will be refunded. Chinese Provisions on Online Auctions, aa 17 & 23.

¹⁹¹ Chinese Provisions on Online Auctions, a 18.

¹⁹² *ibid*, a 11.

¹⁹³ *ibid*, a 22.

¹⁹⁴ *cf.* the Nan-jin Maritime Court Guidance, s 11 and Chinese SMPL, s 37. The payment process of an online auction is different from that of a traditional offline auction. In the offline auction, payment is made after signing a confirmation of letter before a judge.

¹⁹⁵ Chinese SMPL, s 39.

¹⁹⁶ *ibid*, ss 38, 40; the Provisions of the Supreme People's Court on Auction and Sale of Property in Civil Enforcement by the People's Court (Fa Shi [2004] 16, amended 23 December 2020), aa 20 & 26, hereinafter referred to Chinese Provisions on Civil Enforcement.

¹⁹⁷ Chinese Provisions on Online Auctions, a 26.

court, the ship can be sold at any price. If, eventually, no one wants to buy the ship, that ship will be released from arrest.¹⁹⁸

48. The above inquiry finds that the effects of a judicial sale are similar between states. All the relevant claims cease to attach to the ship, passing onto the sale proceeds, and the successful purchaser obtains clean title to the ship. After sufficient payment is made, a judicial document certifying the transfer of title will be issued and given to the purchaser. From that moment, the sale becomes final.

49. Conflicting methods are used to guarantee the best possible price. Chinese and English laws require the reserve price to be met, failing which a sale may not be concluded, although they follow different principles in this regard. English law believes that price secrecy can avoid collusion between bidders, resulting in higher bids.¹⁹⁹ Chinese law, however, counts on transparency in enforcement, particularly the value of the property, to prevent bidders and court officials from manipulating auctions.²⁰⁰ The other two states invoke other solutions to achieve a reasonable price. Maltese law offers general guidance, directing a sale to be conducted in the most advantageous manner to the interested parties. On the other hand, Dutch law establishes a detailed two-part auction process consisting of bidding and decreasing.

B) Court-approved private sale

50. As a variation on the standard judicial sale procedure, a court-approved private sale is viable in many states. Its operation in English, Dutch and Maltese laws is examined below.

51. Before a judicial sale is ordered,²⁰¹ English law may, under “special circumstances”, approve a court-approved sale in favour of a named buyer at a defined price, upon the application by an interested person.²⁰² Such a sale process has not met a friendly reception in common law jurisdictions but is regarded as

¹⁹⁸ Chinese Provisions on Arrest and Sale, aa 12-14.

¹⁹⁹ E. C. JIANKAI, “Judicial Sale of Arrested Vessels: The Suitability of Taobao as a Platform for Singapore Judicial Sale”, SAclJ, 2019, vol. 31, pp. 72-94.

²⁰⁰ X. BAI, “Defining the Legal Relationship between Parties in the Reform of Judicial Auction”, *China Trial* (Beijing, 5 March 2012). The original title in Chinese: 司法拍卖改革中各方参与主体法律关系的界定.

²⁰¹ Once a sale order is rendered by the court, any attempt to sell the ship privately constitutes a contempt of court. *The Ruth Kayser* (1925) 23 Ll L Rep 95. See also N. MEESON / J. KIMBELL, *Admiralty Jurisdiction and Practice*, 5th ed, Informa Law from Routledge, 2017, paras. 4.116-118.

²⁰² *The Union Gold* [2014] 1 Lloyd’s Rep 53.

dubious and unattractive.²⁰³ General concerns about the state of the market,²⁰⁴ the substantial costs of maintaining the ship,²⁰⁵ or that there is only one claim attaching to the ship,²⁰⁶ probably cannot pass the strict scrutiny by an English court as to whether or not “special circumstances” exist.²⁰⁷

52. Dutch law allows a court-approved private sale in the context of a domestic mortgage.²⁰⁸ A mortgagee can petition the court for a private sale, a week before the planned sale.²⁰⁹ The agreement between the seller and buyer, a list of interested parties, and any further bids received must be submitted to the court.²¹⁰ The court may request an additional appraisal before approving the petition.²¹¹ If the petition is denied after due consideration, for instance, a better price is possible, the court will decide the date for a fresh auction.²¹²

53. Malta greets a court-approved private sale.²¹³ The procedure of a court-approved sale is triggered with the filing of an application by a creditor with an enforceable title to the court. The application shall be accompanied by two independent appraisals of the ship provided by well-established valuers in the market; additionally, the applicant must submit evidence that a private sale is to the benefit of all known creditors and the price proposed is realistic in light of the circumstances *ad hoc*.²¹⁴ Besides, the applicant must serve the application on those who are deemed by the court, in this context and upon the information given by the applicant, as appropriate to call upon to make their submissions.²¹⁵ The court shall

²⁰³ P. MYBURGH, “‘Satisfactory for its Own Purposes’: Private Direct Arrangements and Judicial Vessel Sales”, *JIML*, 2016, vol. 22, pp. 355-369.

²⁰⁴ But the fact that there is no ready market for the ship to be sold may suffice as an argument for a court-approved private sale. *Offshore Interiors Inc v Worldspan Marine Inc* [2014] FC 655.

²⁰⁵ *The Turtle Bay* [2013] 4 SLR 615 (Singapore HC).

²⁰⁶ P. MYBURGH, “‘Satisfactory for its Own Purposes’: Private Direct Arrangements and Judicial Vessel Sales”, *JIML*, 2016, vol. 22, pp. 355-369.

²⁰⁷ *Sea-Tec Fabricators Ltd v Offshore Fishing Co* [1985] FCJ 236.

²⁰⁸ Dutch Book 3, a 268. See Bleyen (n 15) 136.

²⁰⁹ Dutch CCP, a 548 (2).

²¹⁰ *ibid*, a 548 (3).

²¹¹ L. BLEYEN, *Judicial Sales of Ships: A Comparative Study*, Springer, 2016, p. 136.

²¹² Dutch CCP, a 548 (4).

²¹³ Maltese COCP, a 363. For a synopsis regarding court-approved private sales in Malta, see J. SCERRI-DIACONO, “Private, Court-Approved Sales of Vessels and Aircraft in Malta”, *LMCLQ*, 2012, pp. 356-358.

²¹⁴ Maltese COCP, a 359.

²¹⁵ *ibid*, a 360.

appoint a hearing for the application within ten days of its filing.²¹⁶ If the application is approved, the court will appoint a representative for the shipowner to transfer the ship.²¹⁷ This representative shall deposit the price in the court within seven days from completion of the sale.²¹⁸

54. In conclusion, differing attitudes towards a court-approved private sale are adopted. In English law, this form of sale has met a hostile reception, as it is allowed only in exceptional circumstances. Expediency and efficiency associated with a private sale cannot compensate for the loss of judicial impartiality and a possible higher price.²¹⁹ Maltese law, however, admires the procedural efficiency brought by the private sale of a well-appraised ship.²²⁰ One may say that the straightforward mechanism for private sales leaves little room for a Maltese court to refuse them. As to Dutch law, a private sale can only be initiated by a Dutch mortgagee. Other enforceable titles are not eligible.

55. The discussed private sale in this subsection shall be distinguished from the sale to a designated person at a fixed price in Chinese law. Although both are judicial sales, the latter is the subsequent step following the failure of consecutive auctions rather than a substitution for them.

C) Stopping the sale

56. Interested persons may oppose a judicial sale and request it to stop.²²¹ Specifically, the persons who should have been notified of the sale, whether were or were not notified in fact, could intervene in this manner.

57. In English law, the marshal may stop a judicial sale upon a written notice asserting that the claim has been satisfied. The marshal will recover all the expenses incurred relating to the discontinued sale from the claimant who promised such in its undertaking when petitioning the sale. If the sale is too advanced at that moment, the marshal will refuse the stopping application. The claimant may then file a motion

²¹⁶ *ibid*, a 361.

²¹⁷ *ibid*, a 362.

²¹⁸ *ibid*, a 363.

²¹⁹ *The Union Gold* [2014] 1 Lloyd's Rep 53.

²²⁰ J. SCERRI-DIACONO, "Private, Court-Approved Sales of Vessels and Aircraft in Malta", *LMCLQ*, 2012, pp. 356-358.

²²¹ Stopping is adopted as a general term in this article, meaning that the sale cannot proceed. It includes suspension, discontinuance and rescission.

to the judge for an order to stop the sale.²²² In that case, the sale may be stopped if sufficient security can be provided to satisfy all the claims on the ship.²²³

58. In Dutch law, an interested party may file a dispute about the conditions, date, place, etc. of a judicial sale before the provisional measures judge.²²⁴ Presumably, a party may apply for the sale to stop on the ground of the debt having been met. Besides, any third party who owns wholly or partly the asset, or a right that the executor must respect, is entitled to oppose a sale before it takes place.²²⁵ Moreover, the sale as an enforcement measure may be stopped based on valid grounds with regard to the enforceable title. Such as, the judgment to be enforced is based on a factual or law error. The court will suspend the sale pending an appeal.²²⁶ Presumably, the liable party will be responsible for the costs incurred by the halted sale.

59. Under Maltese law, if the debt is met and the auction's costs are obtained, the court registrar may discontinue a sale and return the ship to the debtor upon a verbal demand.²²⁷ The sale may also be suspended upon the debtor's demand with the creditor's consent²²⁸ or any other lawful impediment.²²⁹ Absent consent, the demand will not be entertained unless the expenses occasioned by the suspension have been deposited in the court.²³⁰ The court shall hear the parties about the demand, and no decree will be given before the expenses incurred by the halted sale have been deposited in the court.²³¹ A fresh advertisement shall be published for the continuance of the auction.²³²

60. Chinese law establishes various grounds for stopping a sale. According to the general civil procedural rules, the court may rescind an enforcement measure,

²²² N. MEESON / J. KIMBELL, *Admiralty Jurisdiction and Practice*, 5th ed, Informa Law from Routledge, 2017, para. 4.115.

²²³ *The Acrux* [1961] 1 Lloyd's Rep 471.

²²⁴ Dutch CCP, a 518. Decisions for such matters cannot be appealed.

²²⁵ *ibid*, a 538. The unsuccessful opposer may be ordered to pay compensations at the executor's request.

²²⁶ HR 22 April 1983, NJ 1984, 145. See L. BLEYEN, *Judicial Sales of Ships: A Comparative Study*, Springer, 2016, p. 84.

²²⁷ Maltese COCP, a 343. The discontinuance does not bar the exercise of the right of other arrestors.

²²⁸ Or upon the creditor's demand with the debtor's consent.

²²⁹ Maltese COCP, a 326 (1).

²³⁰ *ibid*, a 326 (2).

²³¹ *ibid*, a 326 (4).

²³² *ibid*, a 326 (1).

such as a judicial sale, upon the objection filed by an interested party against the asset or illegal enforcement actions,²³³ before the measure becomes final.²³⁴ Besides, before a sale takes place, it may be discontinued by the court if enforcement is no longer entailed, for instance, viz., the enforceable document having been revoked, the debt having been met, or an agreement of repayment having been reached between the litigants.²³⁵ Under Chinese SMPL, similar but more specific grounds for stopping a sale are provided for. The maritime court may, at discretion, approve the withdrawal application by the sale applicant, if such is petitioned seven days before the sale date.²³⁶ After approval, the court will recover the expenses incurred by the stopped sale from the applicant.²³⁷ In the context of malicious collusion between bidders, a sale concluded may be set aside before it becomes final.²³⁸ The party suffering losses with the sale's stopping may recover compensations from the court²³⁹ or any other liable party.²⁴⁰ Pending a decision as to whether the sale shall be stopped, the court, in principle, will not suspend the sale.²⁴¹

61. Each studied national legal system has established its respective grounds for stopping a ship sale. Chinese law bases the stopping grounds on what the parties to the claim would like to do and the illegitimacies in the sale. English law pays attention to the satisfaction of the debt. As regards Maltese laws, importance is attached to the judicial costs and the parties' consensus. Dutch law, as opposed to

²³³ Such as the successful purchaser has no qualification to submit tenders, or there is malicious collusion between the court official and bidders.

²³⁴ Chinese CCP, aa 225, 227; the Provisions of the Supreme People's Court on Several Issues Concerning the Enforcement Objections and Reviews by the People's Courts (Fa Shi [2015] 10), a 6.

²³⁵ Chinese Provisions on Civil Enforcement, a 17; Chinese Provisions on Online Auctions, a 31.

²³⁶ If a sale is far advanced, the withdrawal may be rejected.

²³⁷ Chinese SMPL, s 31.

²³⁸ *ibid*, s 41. This provision does not address the timeframe for such a dispute, however, in light of the fact that an objection grounded on the collusion between the court official and bidders shall be filed before the sale becomes final, it seems reasonable that the same time limit shall apply as well.

²³⁹ National compensations can be applied in this case. Chinese Provisions on Online Auctions, a 32.

²⁴⁰ A fresh proceeding shall be commenced in this case. Chinese Provisions on Online Auctions, aa 32, 33; Chinese SMPL, s 41.

²⁴¹ Chinese CCP, aa 225, 227; The Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Enforcement Procedures of the Civil Procedure Law of the People's Republic of China (Fa Shi [2008] 13), a 10. If security can be provided by the opposer to the satisfaction of the court, the court may suspend the enforcement. On the other hand, the stopped enforcement may also be resumed given sufficient security by the executor. Thus, no straightforward answer can be given in this matter.

the other jurisdictions, leaves the stopping grounds to the general procedural rules governing enforcement.

4. After the sale: priority and payout

62. Once the sale proceeds are deposited in the court, the court usually will not make payment out of the sale proceeds until the order of the priorities of the claims filed against the proceeds is determined. Depending on the type of sale and the state conducting it, the court that approved (a private sale), ordered (a public auction or private treaty),²⁴² or within whose cognisance the ship was located when sold (Dutch law),²⁴³ will determine the order of priorities and make payments out.

63. When an English court orders a ship to be sold, it may also fix a period during which notice of claims against the sale proceeds shall be filed and the time and manner in which that time limit must be advertised.²⁴⁴ Any judgment creditor may then apply for the determination of the priorities of the competing claims against the proceeds.²⁴⁵ The application shall be served on all cautioners and all persons who have filed a judgment against the property.²⁴⁶ After the admiralty judge determines the order of priorities,²⁴⁷ the proceeds will be divided accordingly. Theoretically, if a lower-ranking claimant makes a payment application, the court may defer the application until the higher-ranking creditors have had the chance to pursue their claims to judgment.²⁴⁸

In practice, however, this procedure is hardly ever adopted. Most times, the court does not prescribe a time for determining priorities and obtaining payment out. Nor will potential claimants be reminded by an advertisement that they shall take measures to safeguard their interests. It is also rare practice to make an application for determining priorities or for there to be a hearing, to the extent that parties will

²⁴² English, Maltese and Chinese law. See Section 2.3.

²⁴³ L. BLEYEN, *Judicial Sales of Ships: A Comparative Study*, Springer, 2016, p. 86.

²⁴⁴ English CPR, r 61.10.2.

²⁴⁵ Unless the court has fixed a day before which an application for determining order cannot be made. In that case, the application shall be filed after that date. English CPR, r 61.10.3.

²⁴⁶ English CPR, r 61.10.4; English PD, r 61.9.1. See N. MEESON / J. KIMBELL, *Admiralty Jurisdiction and Practice*, 5th ed, Informa Law from Routledge, 2017, para. 4.132.

²⁴⁷ English PD, r 61.9.4.

²⁴⁸ R. HEWARD, «England and Wales Part III. Judicial Sales of Vessels and Priority of Claims», in C. BREITZKE / J. LUX (eds.), *Maritime Law Handbook*, Kluwer Law International BV, 2019, p. 25.

generally agree upon the order of priorities pursuant to the well-established principles in this regard.²⁴⁹ As a result, unless potential claimants have entered a caution, in which case the payment application by a judgment creditor must be served on them,²⁵⁰ they might become aware of the matter until too late after all the proceeds have been paid out.²⁵¹

64. In a Dutch sale, the court-appointed liquidator shall notify all known creditors of the liquidation process²⁵² and invite them to file both the claims and the alleged priority thereof within fourteen days.²⁵³ After the lapse of this period, the liquidator will make an order for distribution in accordance with the fixed order of priorities.²⁵⁴ Any persons who want to oppose this order can do so before the date specified therein.²⁵⁵ Should no opposition be made, the proceeds will be divided accordingly. In the case of an objection, the dispute will be settled in a separate proceeding if no agreement can be reached.²⁵⁶ When there are no pending objections, the liquidator will distribute the fund according to the decided order of precedence.²⁵⁷ The liquidation process cannot be ended until that moment.

65. Under Maltese law, if there is deposited money in respect of which more than two parties allege claims, the court shall cause a notice to be published in one or more periodical newspapers, upon the application of a competing claimant. The advertised notice shall call upon all persons interested therein to put in their claims within one month, state that the said money is in the court and there are claims upon such money, and publish the date on which all the parties who have put in claims shall appear in the trial of the claims.²⁵⁸ This notice will be served on the person making the deposit, the execution creditors and any other creditor at whose suit any

²⁴⁹ *ibid*, p. 15; N. MEESON / J. KIMBELL, *Admiralty Jurisdiction and Practice*, 5th ed, Informa Law from Routledge, 2017, para. 4.133.

²⁵⁰ English PD, r 61.9.1.

²⁵¹ R. HEWARD, «England and Wales Part III. Judicial Sales of Vessels and Priority of Claims», in C. BREITZKE / J. LUX (eds.), *Maritime Law Handbook*, Kluwer Law International BV, 2019, p. 27.

²⁵² Dutch CCP, a 552 para 2.

²⁵³ *ibid*, a 482 para 2.

²⁵⁴ *ibid*, a 483.

²⁵⁵ *ibid*, a 484 para 1.

²⁵⁶ *ibid*, a 486.

²⁵⁷ *ibid*, a 485.

²⁵⁸ Maltese COCP, a 416 (1). The one month may be abridged as the court may deem adequate, Maltese COCP, a 416 (3).

garnishee orders have been issued.²⁵⁹ At the trial, all interested persons, filed competing claims, and objections against those claims will be heard.²⁶⁰ The proceeds will be divided according to the decision on the competition proceeding. Note that additional proceedings and other orders may take place or be made if the court deems necessary.²⁶¹

It is a crucial feature of Maltese law that the expiration of the prescribed time does not bar the exercise of any right on the part of any party who failed to put in its claim on time (*jus avocandi*).²⁶² Admittedly, the decision on the competition proceeding cannot be hindered,²⁶³ nevertheless, if in separate proceedings, the claim of the defaulting party is proved to be prior to or equal to that of the ranked creditor, the defaulting party can subsequently recover from any ranked creditors the money they received. The default may only be considered with regard to adjudging the costs.²⁶⁴ This rule extends the liquidation process. Put in another way, unlike English and Dutch laws, Maltese law does not end the liquidation process the moment the fund is divided according to the determined order of priorities. Instead, it ends when all privileged rights *vis-à-vis* the ship are satisfied.

66. When a Chinese judicial sale is ordered, the court will publish the time and manner in which the claims against the sale proceeds shall be registered in the court, in the advertisement and notification of sale.²⁶⁵ Any potential claimant shall make a written application for registering the claim, accompanied by the supporting evidence, within sixty days of the last time that the sale advertisement appears.²⁶⁶ Otherwise, the claimant is deemed to give up its right to be paid out in this sale.²⁶⁷ The applicant for sale can participate in the distribution without registering its claim.²⁶⁸

After the sale is concluded, the court will examine the registered claims, one by one and in separate proceedings.²⁶⁹ If the claimant has obtained a judgment, an

²⁵⁹ *ibid*, a 416 (4).

²⁶⁰ *ibid*, a 420 (2).

²⁶¹ *ibid*, a 421.

²⁶² *ibid*, a 417.

²⁶³ *ibid*, a 416 (1).

²⁶⁴ *ibid*, a 417.

²⁶⁵ Chinese SMPL, ss 32, 33.

²⁶⁶ Chinese Provisions on Arrest and Sale, a 16.

²⁶⁷ Chinese SMPL, s 111.

²⁶⁸ Chinese Provisions on Arrest and Sale, a 18.

²⁶⁹ *ibid*, a 17.

arbitral award, or other enforceable titles, the court will verify the title's authenticity and then recognise the claim.²⁷⁰ Lacking an enforceable title, the claimant shall, after registering the claim, commence an action for recognising the claim before the court. In that action, the court will make a non-appealable decision.²⁷¹ When all registered claims are examined, the court shall call upon creditors to a meeting, in which the execution judge will publish the amount of the proceeds, the costs incurred by sale, and the nature and ranking of the claims complied.²⁷² If an agreement in respect of the distribution of the proceeds can be reached, the judge will divide the proceeds accordingly. In the case of disagreements, the judge shall determine the order of priorities instead.²⁷³ The determined order is not subject to appeal.²⁷⁴ Note that if the competing creditors cannot altogether attend the meeting, the court can approach them separately and take notes of their respective pleas.²⁷⁵

67. It is a widely considered rule that before filed competing claims are contested, the court may order payment out on account of a particularly vulnerable claimant or where the court deems appropriate.

In English law, if all the interested parties consent or it is admitted that a certain claimant will have precedence against the sale proceeds, the court may order payment absent the determination of priorities.²⁷⁶ A typical example is wage claims. The court may immediately order payment upon the seafarers' application for judgment.²⁷⁷ Maltese law has similar provisions.²⁷⁸ The only difference lies in the precondition that, except for wage claims, any other party who wishes to withdraw money during the compilation of competing claims shall provide a surety for the period of one year.²⁷⁹

68. Two observations are made from the above investigation. First, the provisions on calling upon creditors to protect their interests align with those

²⁷⁰ Chinese SMPL, s 115.

²⁷¹ *ibid*, s 116. If there is an arbitration agreement between the parties, they shall commence arbitration immediately.

²⁷² *ibid*, s 117.

²⁷³ Chinese Provisions on Arrest and Sale, a 22.

²⁷⁴ Chinese SMPL, s 118

²⁷⁵ The Nan-jin Maritime Court Guidance, s 13.

²⁷⁶ English CPR, r 61.10.5.

²⁷⁷ N. MEESON / J. KIMBELL, *Admiralty Jurisdiction and Practice*, 5th ed, Informa Law from Routledge, 2017, para. 4.134.

²⁷⁸ Maltese COCP, a 422.

²⁷⁹ *ibid*, aa 423, 426 (b).

governing notification of sale. English law continues to follow its principle underlying notification rules that ship arrest is constructive notice to the world. Hence, the creditors are expected to keep themselves informed of what happens to the sale proceeds. Chinese and Dutch laws, like what they require for the notification of sale, require notice of the time and manner in which claims against the sale proceeds shall be filed to be given to certain known creditors. Maltese law mandates notice calling upon claimants to put in claims to be published in newspapers. This approach seems in line with the practice of the Maltese court involved in a judicial sale, i.e., wishing but not requiring registered mortgagees to become aware of the sale.

69. Second, in terms of the time when a liquidation process ends, Malta conflicts with the other three states. In Maltese law, the privileged claim of any person who defaulted in putting in the claim within the fixed time can still be paid out of the sale proceeds – the defaulting claimant can recover money from the ranked creditors whose claims are either below or equal to that of the said claimant. Such can never happen in English, Dutch and Chinese laws, where once the fund is divided following the determination of priorities, the liquidation process is closed for good. No defaulting creditor is allowed to recover money received by the ranked creditors. That said, if there are remaining proceeds after distribution, the defaulting creditor may make a charge against the remaining. In light of these statements, it is submitted that Malta provides more protection to higher-ranking claims than other states in the distribution process.

III. Discussion: relevance to the recognition of foreign judicial sales

70. Since a state may employ the principles informing domestic sales as criteria for determining whether a condition for the recognition of a foreign sale is met,²⁸⁰ fundamental divergences in principles across jurisdictions may impair the recognition, hindering the free circulation of the purchaser's title conferred by sale. In view of this, an exploration of these principles is made below, based on the findings from Section 2. The principles that may impede the recognition are discussed before those that may not.

²⁸⁰ Y. SHAO / L. CARBALLO PIÑEIRO / M. Q. MEJIA, JR., “Recognition of Foreign Judicial Sales of Ships and Private International Law”, *JIML*, vol. 28, 2022, pp. 166-186.

71. First, the divergent principles that govern the ship's location may affect the examination of a generally-accepted recognition condition – jurisdiction of a foreign court.²⁸¹

Some states require the ship to remain stayed within the territory throughout the sale, whereas others do not require such. Typically, when there is a link between the Netherlands and the claim, for example, a Dutch mortgage, Dutch law allows a ship to be put under executive arrest and later sold for enforcement purposes, even when it is not situated within the territory of the Netherlands. In this vein, a Dutch court may assert jurisdiction over the ship, based on the artificial *situs* of the *res*, rather than its physical *situs*.²⁸² This approach to assuming jurisdiction is probably unacceptable to the legal systems under which a ship arrest must precede the sale, such as Maltese, English and Chinese laws. In those laws, only the ships that are and will be physically situated within their territories can be disposed of by sale. In light of these statements, if a Dutch sale in which the ship had not been situated within the Dutch territory throughout the sale invokes recognition before an English court, English law may render that the authority conducting the sale did not have jurisdiction to dispose of the ship. Accordingly, recognition will be denied.

72. Second, the contrasting principles concerning the notification of sale may cause a foreign sale to be deemed as offending fairness. More specifically, recognition may be refused for lacking proper notice.²⁸³

Some jurisdictions, such as English law, view ship arrest as constructive notice to the world and thus place the obligations of keeping informed of the ship's status upon the creditors on the ship. Notice of the sale need not be sent to known creditors. Other states, such as China and the Netherlands, view the actual notification to known creditors as an essential part of a fair sale. Neither proper advertisement nor ship arrest can replace such notification. As it stands, if a sale pursuant to the English notification approach seeks recognition in a jurisdiction adopting the Dutch or Chinese notification approach, that sale may be denied recognition on the ground of breaching fairness.

²⁸¹A. BRIGGS, «Recognition and enforcement of judgments (common law)», *Encyclopedia of Private International Law*, 2017, pp. 1479-1486; T. DOMEJ, «Recognition and enforcement of judgments (civil law)», *Encyclopedia of Private International Law*, 2017, pp. 1471-1480.

²⁸² For a discussion on the relation between property dispositions and the ship's *situs*, see A. V. DICEY / others, *Dicey, Morris & Collins on the Conflict of Laws*, 15th ed., Sweet and Maxwell, 2015, para. 22-058.

²⁸³ Y. SHAO / L. CARBALLO PIÑEIRO / M. Q. MEJIA, JR., «Recognition of Foreign Judicial Sales of Ships and Private International Law», *JIML*, vol. 28, 2022, pp. 166-186.

73. Third, the varying attitudes to court-approved private sales may impact the review of the procedural proprieties in a foreign court-approved private sale, which seeks recognition as a foreign judicial sale.²⁸⁴

To petition a private sale before an English court, the applicant must prove the existence of special circumstances. English law deems a price which has not been “tested” by the market and advertisement as suspicious. Even if a private sale might have the same economic outcomes as a court sale, an English court would still be hesitant to approve it, as it may “blur the line between private commercial self-interest and public judicial administration” and thus impair judicial impartiality.²⁸⁵ Dutch law also adopts a cautious approach to approving private sales, permitting such sales in the context of domestic mortgages only. In contrast, Maltese law greets private sales. Its relevant procedural rules imply that the integrity of sales can be maintained by the opportunity of creditors to make submissions and the reliability of prestigious valuers. Arguably, the proceedings wherein a private sale was approved might be reviewed more critically in a state which receives court-approved private sales with a hostile attitude than in one welcoming them.

74. Fourth, some states proffer extra protection to higher-ranking claims when dividing the sale proceeds. Such protection may tighten the recognition approaches followed by those states, making certain recognition conditions more exacting.

Unlike English, Dutch and Chinese laws, where once the fund is divided per the determined order of priorities, the liquidation process ends for good, under Maltese law, the division of the funds according to the court-ordered ranking of claims does not finish the liquidation process. Instead, the privileged creditor who defaulted in putting in the claim on schedule can obtain payment out of the proceeds by recovering money from the ranked creditors, whose claims are either below or equal to that of the defaulting creditor. Such protection to privileged claims seems to form an essential part of the reason why Malta has established a strict mechanism for recognition of foreign sales. As shown in the Maltese case concerning the recognition of a Jamaican judicial sale, the fact that a Maltese claim was not given the same importance in a foreign sale as provided for under Maltese law could lead to non-recognition of the foreign sale.²⁸⁶

75. Notably, although some principles informing domestic sales diverge substantially, they may not necessarily hinder the recognition of foreign sales. The

²⁸⁴ *ibid.*

²⁸⁵ P. MYBURGH, “‘Satisfactory for its Own Purposes’: Private Direct Arrangements and Judicial Vessel Sales”, *JIML*, 2016, vol. 22, pp. 355-369.

²⁸⁶ The case involving the ship *Bright Star*, see M. THOMPSON, “Ship Auctioned in Jamaica Rearrested in Malta”, *The Gleaner* (22 February 2019); J. P. GAUCI-MAISTRE / others, “Malta Overrules Foreign Auction”, *The Arrest News* (April 2019).

reason is that when examining the integrity of a foreign sale, the court might not pay attention to the sale aspects governed by these principles. Two sets of such principles are identified as follows.

76. One set of principles governs the moment to initiate a sale. Some jurisdictions, typically those with maritime jurisdiction, permit a sale *pendente lite* when good reasons for sale can be substantiated. Others, especially those rooted in civil law tradition, allow a sale as an enforcement measure to be commenced only in virtue of an enforceable title.

The moment of initiating a sale is, more apparent than real, connected with the recognition condition concerning the competence of a foreign court to the dispositions of movables. This competence usually refers to the jurisdiction of the foreign court over ships. Sometimes, it may also refer to a specific jurisdiction only under which ships can be disposed of, such as the admiralty jurisdiction in common law countries.²⁸⁷ One way or another, if the competence of the foreign court could be ascertained, when the sale was ordered would not be considered further.

77. The other set concerns the approaches for achieving the best possible price. English and Chinese laws follow conflicting principles in using the minimum and appraised prices. English law states that these prices must remain a secret,²⁸⁸ as secrecy can prevent bidders from collusion and thus achieve a higher price. On the other hand, Chinese law depends on judicial transparency to avoid unlawful actions by bidders or court officials. The whole appraisal report and the reserve price shall be posted online to be accessed by the public. Malta and the Netherlands do not regard the minimum and appraised prices as necessary for obtaining the best possible price. Maltese law directs a sale to be conducted in a manner most advantageous to the interested parties, whereas Dutch law has a two-part auction process consisting of bidding and decreasing.

The price issues may be sufficient to mount to an objection against the integrity of a foreign sale, grounded in fairness or natural justice.²⁸⁹ Where the price in question is “a grossly inadequate price” lower than its “true fair market value,” the foreign sale may be denied recognition.²⁹⁰ In other words, what matters in an

²⁸⁷ Y. SHAO / L. CARBALLO PIÑEIRO / M. Q. MEJIA, JR., “Recognition of Foreign Judicial Sales of Ships and Private International Law”, *JIML*, vol. 28, 2022, pp. 166-186.

²⁸⁸ If no bids are higher than the appraised price, the appraised price and the highest bid will be divulged to the bidders. See Subsection 2.3.1.

²⁸⁹ Y. SHAO / L. CARBALLO PIÑEIRO / M. Q. MEJIA, JR., “Recognition of Foreign Judicial Sales of Ships and Private International Law”, *JIML*, vol. 28, 2022, pp. 166-186.

²⁹⁰ *Bollinger & Boyd v Capt. Claude Bass* (1978) 576 F. 2d 595, 598 (US, 5th Cir). W. TETLEY / R.C. WILKINS, *Maritime Liens and Claims*, International Shipping Publications, 1998, pp. 1103-1104, notes 50-51 and their accompanying text.

objection based on price issues is the amount of money, rather than how the money was obtained.

IV. Conclusion

78. As an enforcement measure, judicial sales are used across jurisdictions, though carried out in various manners under national laws. The principles informing domestic sales are in support of the procedural rules governing the sale proceeding. Some of these principles are fundamentally different from one state to another. Through the comparative analysis undertaken by this article, it is discovered that contrasting principles exist with regard to six respective aspects of the sale proceeding.

79. These conflicting principles may impair the recognition of foreign judicial sales, on the basis that a state requested to give effect to a foreign judicial sale may use the principles under its own law as the criteria for determining whether certain conditions for recognition, such as natural justice, fair trial or public policy, are met. In light of the prevailing conditions for recognition of foreign sales, it is inferred that among the discovered principles, only those regarding four sale aspects may resurface at the recognition stage and impede the cross-border circulation of the purchaser's title. These sale aspects are the ship's location, the notification of sale, the variance in the standard sale, and the extra protection given to high-ranking creditors in the distribution. On the other hand, the principles as regards the time to initiate a sale and the approach to obtaining the best possible price, though substantially divergent, may not impede the recognition.

Paper 4

A Newcomer to Maritime Law: The Beijing Convention on the International Effects of Judicial Sales of Ships

Paper 4 Yingfeng Shao, Laura Carballo Piñeiro and Maximo Q. Mejia, Jr., ‘A Newcomer to Maritime Law: The Beijing Convention on the International Effects of Judicial Sales of Ships’ (manuscript for submission to a peer-reviewed academic journal).

Abstract:

In November 2022, the General Assembly adopted a convention concerning the international effects of judicial sales of ships. Wishing to contribute to the task now facing countries – deciding whether to ratify, this paper examines how the new Convention will work in the pragmatic world and the challenges this instrument may face.

This Convention provides a convenient and consistent recognition approach for judicial sales. By this approach, effect will be automatically given to the clean title perfected via a foreign judicial sale, subject only to public policy exception. As the consequences of recognition, the registration actions and the ship arrest by previous creditors are prescribed. Moreover, this approach would at large be applied, as the new Convention follows the principle of *favour registrationis* and would generally prevail where more than one instrument concerning the international effects of judicial sales is applicable. As to the challenges the Convention may meet, they include the potential reluctance of common law states to ratify the Convention and a possible criticism with regard to the limited types of forced sales covered by the Convention. However, as far as this paper is concerned, the speculative concern about common law countries may be unnecessary, and a partial achievement is better than none. In view of the legal certainty that may be brought by the convenient and consistent approach under the new regime, on the one hand, and the very nature of a treaty as a compromise, on the other hand, ratification is supported.

1. Introduction

As a momentous development in contemporary international maritime law, a new treaty governing the international effects of judicial sales of ships was adopted recently¹. Under the auspice of the United Nations Commission on International Trade Law (UNCITRAL), the new instrument, often known as the Beijing Convention, was concluded in New York, USA, in July 2022² and later in the same year, adopted by the General Assembly of the United Nations. In teleological terms, this Convention aims to enhance certainty in the outcome of a judicial sale, which serves as "a remedy determinative of substantive issues"³ in respect of the ship or shipowner.

The preparation for the Convention has been "a long and arduous business",⁴ like all the other conventions on transportation law.⁵ The original project on this topic was undertaken by the Comité Maritime International (CMI), which after six years of deliberation, approved in June 2014 the text of an instrument concerning cross-border issues related to the judicial sale of ships. That instrument was adopted by the Working Group VI of UNCITRAL (Working Group) in 2018 and used as the basis for its future work.⁶ At its fifty-third session in 2020, UNCITRAL concurred with the Working Group's suggestion that only a convention could ensure the extent of legal certainty required to guarantee the international effects of judicial ship sales.⁷ During the following four sessions from 2020 to 2022, the Working Group considered several controversial issues, including the issues of clean title, the function of notice sent before a sale, the mechanism of sale certificates, and the

¹ UNCITRAL, *Draft Explanatory Note on the Convention on the International Effects of Judicial Sales of Ships – Part I*, A/CN.9/1110, para 3, hereinafter referred to as Explanatory Note – Part I.

² United Nations General Assembly, *Report of the United Nations Commission on International Trade Law*, A/77/17, para 99. This report covers the fifty-fifth session of the UNCITRAL Commission, held in New York in 2022, and it was submitted to the 77th General Assembly for comments. Hereinafter referred to as Report of UNCITRAL 2022. Besides, the Beijing Convention discussed and cited in this paper, refers to the Convention annexed to this Report.

³ David. C. Jackson, *Enforcement of Maritime Claims* (Informa Law from Routledge 2005) ch 25.

⁴ Roy Goode, 'From Acorn to Oak Tree: The Development of the Cape Town Convention and Protocols' (2012) 19 *Uniform Law Review* 599.

⁵ A fine example is the preparation work for the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as Rotterdam Rules, U.N. Doc. A/RES/63/122. See Michael F. Sturley, 'Transport law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules' in D Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules* (Lawtext Publishing Limited 2009) 1-33.

⁶ Report of UNCITRAL 2022, paras 11-14.

⁷ *ibid*, para 16.

establishment of an online repository.⁸ Through six revisions, the text of the Beijing Draft Convention was finalised and approved by UNCITRAL, who then remitted it to the General Assembly for adoption. Worth celebrating, the Convention was adopted in November 2022.⁹

The Six Committee (Legal) of the General Assembly regards the Beijing Convention as necessary. It accentuates that shipping plays a crucial role in international trade and transportation, and ships used in both seagoing and inland navigation are of high economic value. As a means to enforce relevant claims, the judicial sale must obtain a reasonable price in order to benefit both shipowners and creditors. It is therefore wished that by creating a convention able to disseminate information on prospective judicial sales and give international effects to these sales, purchasers can be given adequate protection and hence the sale price offered by bidders may be positively impacted.¹⁰ Put in another way, absent legal certainty as regards judicial sales that a sale can confer a valid title, potential bidders, concerned with the nuisance by previous creditors and the difficulty de/re-registering the ship, may refuse to pay a high price, which in turn reduces the proceeds to be distributed and obstructs the judicial sale from performing its function. Even worse, the continuation of uninterrupted international trade, contingent on the free flow of maritime traffic, may be disturbed. A new convention, which may augment the existing international legal framework on shipping and navigation and aid the development of harmonious international economic relations, is thus in need.¹¹

Previously, several attempts were made to enhance legal certainty of judicial sales, albeit unfruitful. Since the 19th century, legal issues of maritime securities and their scope and priority have been under the limelight.¹² In the course of striving for uniformity in the field of mortgages and maritime liens, during which three conventions on maritime liens and mortgages were produced,¹³ the maritime law

⁸ *ibid*, para 18.

⁹ The Six Committee (Legal), on 7 November, at its 34th meeting, approved the draft resolution entitled “United Nations Convention on the International Effects of Judicial Sales of Ships”, without a vote. For more facts, see the website of the General Assembly: <https://www.un.org/en/ga/sixth/77/uncitral.shtml> accessed 1 March 2023.

¹⁰ The Six Committee (Legal), *Draft Resolution United Nations Convention on the International Effects of Judicial Sales of Ships*, A/C.6/77/L.8, 1-2.

¹¹ *ibid*, 1.

¹² Jose Maria Alcantara, ‘A Short Primer on the International Convention on Maritime Liens and Mortgages, 1993’ (1996) 27(2) *J.Mar.L.&Com.* 219.

¹³ The Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 1926 (MLM Convention 1926), adopted on 10 April 1926, No. 2765. The Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages,

community always kept in mind the significance of judicial sales for maritime securities, trying to add certainty to the outcome of those sales as regards the transfer of ownership.¹⁴ However, none of those attempts was successful. Not only have the mentioned conventions failed to obtain sufficient interest from nations and thus ratifications, but the relevant convention rules, intended to ensure the universal validity of the purchaser's title, are unsatisfactory. Of particular importance, the Geneva Convention on Maritime Liens and Mortgages, 1993 (MLM Convention 1993) concentrates on the harmonisation of procedural requirements to perfect a valid title in the state where the ship was located at the time of sale, meanwhile leaving recognition matters to national law. Despite a reference to the registrar that upon the production of a certificate evidencing the sale the registrar shall terminate the ship registration, under the MLM Convention 1993, the certificate form is not prescribed and the grounds for denial of recognition are not set forth. Thus, how a public authority facing the certificate would treat the certified foreign sale remains subject to national law.¹⁵ Undeniably, the uniform rules governing the certificate and sale procedure, to a degree, have repercussions on recognition proceedings, but considering the mentioned problems, it is evident that the MLM Convention 1993 cannot well serve the purpose of guaranteeing the free cross-border circulation of title.¹⁶

Noteworthy and in line with this discussion, the majority of the national responses to the CMI survey inquiring whether the existing conventions' rules were sufficient for recognition¹⁷ affirmed that the adoption of a separate and new international instrument might further facilitate recognition, including for registration purposes.¹⁸ Based on that affirmation, the Beijing Convention came into existence.

1967, adopted on 27 May 1967, this convention has not entered into force. The Geneva Convention on Maritime Liens and Mortgages, 1993 (MLM Convention 1993), 2276 UNTS 39.

¹⁴ Such attempts are conspicuous in the MLM Convention 1993, Article 12 of which mandates that the clean title produced by a judicial sale following the rules of this Convention shall be respected everywhere. Likewise, Article 9 of the MLM Convention 1926 governs the outcome of a judicial sale in connection with maritime securities, whereby a judicial sale shall purge maritime liens.

¹⁵ Yingfeng Shao and Laura Carballo Piñeiro, 'Towards a Harmonised Approach to the Recognition of Foreign Judicial Sales of Ships Through Conventions Addressing Maritime Liens and Mortgages' (2021) *Il Diritto Marittimo* 736.

¹⁶ *ibid.*

¹⁷ Francesco Berlingieri, 'Synopsis of the Replies from the Maritime Law Associations of Argentina, Australia, Belgium, Brazil, Canada, China, Croatia, Denmark, Dominican Republic, France, Germany, Italy, Japan, Malta, Nigeria, Norway, Singapore, Slovenia, South Africa, Spain, Sweden, America, Venezuela to the Questionnaire in Respect of Recognition of Foreign Judicial Sales of Ships' in CMI, *Year Book 2010*, 247-384, 370.

¹⁸ William M. Sharpe, 'Towards an International Instrument for Recognition of Judicial sales of Ships – Policy Aspects' in CMI, *Year Book 2013*, 166-182.

Facing the adoption of the Convention, now the question is whether to ratify it or retain the *status quo*. Therefore, it is exceedingly important to understand how the Convention will work in the pragmatic world and the challenges it may encounter. This paper is intended to contribute to that process. Section 2 clarifies the Convention's material, territorial and temporal scope of application, followed by a thorough discussion on the recognition under the Convention in Sections 3-5. Section 6 is devoted to the challenges the Convention may face. With these foundations, Section 7 concludes that the new Convention brings a convenient and consistent approach.

2. The scope of application of the Convention

2.1 Material scope of application

The Convention deals only with certain types of judicial sales of ships. Two criteria must be met before a sale can be categorised as such. First, the sale constitutes a judicial sale that fits the definition of judicial sales in the Convention.¹⁹ Second, the ship sold is not the type of ship excluded from the Convention.²⁰

The Convention provides an autonomous definition for the judicial sale of ships, by reference to (i) the type of assets involved, (ii) the rights involved in the sale, and (iii) the procedure used to perform the sale.

Ships, as the asset involved, do not allude to any particular kind of vessel. So long as a vessel can be registered in a registry²¹ open to public inspection and is qualified to be the subject of an arrest or other similar measure²² able to lead to a judicial sale under the law of the state conducting the sale,²³ that vessel constitutes a ship under

¹⁹ The Beijing Convention, Articles 2 (a) & (b).

²⁰ *ibid*, Article 3 (2).

²¹ The registry here alludes to not only ship registries but also other public authorities who maintain records of the rights on ships, such as a commercial registry where mortgages on ships can be registered.

²² Arrest as understood in the new Convention is the same as understood in the International Convention on Arrest of Ships, 1999 (Arrest Convention 1999), 2797 UNTS 3. Article 1 (2) of the latter states that “arrest” refers to “any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument.” See UNCITRAL, *Draft Explanatory Note on the Convention on the International Effects of Judicial Sales of Ships – Part III*, A/CN.9/11110/add.2, para 23. Hereinafter referred to as Explanatory Note – Part III.

²³ The Beijing Convention, Article 2 (b).

the Convention. Hence, seagoing and inland navigation ships,²⁴ as well as commercial and pleasure watercraft, are all covered. While this definition of ships excludes warships and ships owned or operated by states for non-commercial governmental service, on account that those ships are usually exempted from arrest, Article 3 (2) of the Convention reiterates its non-applicability as regards those vessels.²⁵

The rights involved in the sale cover a broad range of rights from private and public law sectors, including mortgages or *hypothèques*,²⁶ maritime liens, other private law claims in connection with the ship,²⁷ and claims by a public authority against the proceeds, such as a port authority claim for unpaid port dues, or a tax authority claim for overdue taxes. A sale does not fail to be a Convention judicial sale merely because it follows a seizure by the tax or customs authority. However, if the sale proceeds become government revenue and thus will not be distributed among the previously said creditors, the sale in question cannot constitute a judicial sale under the Convention.²⁸

The Convention singles out two features that commonly exist in sale procedures across jurisdictions, *viz.*, a judicial sale shall be conducted under the authority of a court or other public authority, regardless of when the sale is ordered, and the form of sale may be either via a public auction or through a private treaty. With these two features as criteria to identify judicial sales, the Convention accommodates a multitude of forced sales existing in national law, including: sales *pendente lite*, a typical construct in common law;²⁹ private sales negotiated between litigants under

²⁴ Inland navigation vessels may fall outside the scope entirely, as Article 13 of The Beijing Convention requires the provisions of this Convention to give way to other conventions concerning inland navigation vessels.

²⁵ Explanatory Note – Part I, para 88.

²⁶ The Beijing Convention, Article 2 (d). Mortgages and *hypothèques* are two different devices to secure payment of a monetary sum. The draft convention defines “mortgages and *hypothèques*” as a single term by reference to the fact of registration in the state of registration rather than to their natures. See Explanatory Note – Part I, paras 53-55.

²⁷ *ibid*, Article 2 (f). “Charges” under Article 2 (e) cover any property right, other than mortgages and *hypothèques*, in the ship, irrespective of what they are named or whether they are known to a particular state.

²⁸ Explanatory Note – Part I, paras 30-38.

²⁹ In English law, a sale may be petitioned by any party at any stage in an action *in rem*, by virtue of the Civil Procedure Rules 1998, r 61.10. Other jurisdictions rooted in common law are similar in this matter, such as Singapore, Malaysia, Brunei and India, see Lawrence Tec, ‘Judicial Sale of Vessels in Asia-Pacific Common Law Jurisdiction’ in CMI, *Yearbook 2013*, 150-166.

the supervision of a court, a worldwide recognised practice;³⁰ and sales to particular persons following the failure of public auctions, as provided for in Chinese law.³¹ Notably, "private treaty" in the Convention refers to a private sale concluded between the owner or mortgagee and the prospective purchaser under the supervision and with the approval of a court.³² It differs from a private treaty in the English admiralty jurisdiction, which is still a public tender process.

2.2 Territorial scope of application

The Convention applies in the territory of the state parties bound by this Convention. More specifically, it applies to judicial sales conducted in a state party.³³ Whether or not a ship is registered in a state party does not matter. The mere fact that a ship is registered in a non-party state does not render a judicial sale of that ship falling outside the scope of the Convention.³⁴

The Convention prescribes a specific moment to measure the territorial connection between the sale and the forum carrying out it: at the time of sale, the ship to be sold must be physically within the territory of the state where the sale occurs (the ship's presence requirement).³⁵ Notably, although a ship arrest precedes the sale of the ship in general, the time of arrest, which under the International Convention on Arrest of Ships, 1999³⁶ is the moment that the state within whose territory the arrest occurs judicially authorises this arrest, is irrelevant here.³⁷

The ship's presence requirement is intended to ensure a jurisdictional link between the public authority carrying out the sale and the ship sold.³⁸ Considering the divergences among states as to when jurisdiction to dispose of ships can be asserted,

³⁰ Dutch law allows a court-approved private sale in the context of a domestic mortgage, see Book 3 of the Dutch Civil Code (Dutch Book 3), a 268. Such sales can also be found in Maltese and English laws, although the procedures in these jurisdictions differ.

³¹ The Provisions of the Supreme People's Court on Several Issues Concerning the Application of Laws to the Arrest and Auction of Ships (Fa Shi [2015] 6), aa 12-14. Following three consecutive failures of public auctions, a ship can be sold by the court to a designated person at a fixed price of more than 50% of the appraised price.

³² The Beijing Convention, Article 2 (a) (i). Explanatory Note – Part I, para 34.

³³ The Beijing Convention, Article 3 (1) (a).

³⁴ Explanatory Note – Part I, para 82.

³⁵ The Beijing Convention, Article 3 (1) (b).

³⁶ 2787 UNTS 3, Article 2 (1).

³⁷ Explanatory Note – Part I, para 85. Thus, if a state allows arresting a ship before it enters the territorial waters, that state can still do so, as this Convention does not prevent such.

³⁸ Explanatory Note – Part I, para 84.

the Convention defers the time of sale to the law of the sale state.³⁹ Some legal orders loosely govern this issue, lacking a specific rule on when jurisdiction over ships can be exercised. Instead, they consider jurisdiction to be exercised over a period, from either the moment the ship enters the territorial waters, such as in Maltese law,⁴⁰ or when a competent court arrests the ship, as in English law.⁴¹ In comparison, other states may consider jurisdiction to be exercised at a particular time. Such as, when the court orders or approves the sale, or when the ship is awarded to the purchaser.⁴² For example, in Chinese law, the pertinent time is when the court orders a sale,⁴³ whereas in Dutch law, it is when the ship is arrested for enforcement purposes.⁴⁴

Will these legal divergences concerning the time of sale make room for uncertainty? The answer seems to be no for two reasons. First, before a sale, most states would arrest the ship and then keep the ship arrested throughout the sale proceeding until the ship is awarded to the purchaser.⁴⁵ Thus the presence requirements will usually be met. Second, a foreign sale seeking recognition abroad must be attested by a certificate that is issued by the sale state pursuant to the Convention and certifies that the sale was concluded per the requirements of this Convention and the law of the sale state.⁴⁶ In this vein, if a certificate exists, the sale attested must have been conducted by a public authority which has competency for sale in terms of both the Convention (the ship's presence requirement) and national rules (at the time of sale).

³⁹ The Beijing Convention, Article 4 (1).

⁴⁰ See Seafarer's Rights International, 'Ship Arrest for Seafarers' Wages in Malta', para 3.1 <https://seafarersrights.org/legal_database/ship-arrest-for-seafarers-wages-in-malta/> accessed 6 June 2022; Berlingieri, 'Synopsis' (n 17) question 2.1 (Malta).

⁴¹ Actions *in rem*, whereunder ship sales can be ordered, must be brought before the Admiralty Court of the Queen's Bench Division of the High Court, which assumes the jurisdiction to dispose of a specific ship by arresting that ship. Note that The Civil Procedure Rules 1998, r 61.5(1) allows an arrest both before and after judgment. Compare *The Alletta* [1974] 1 Lloyd's Rep 40 and *The Daien Maru* [1986] 1 Lloyd's Rep 387.

⁴² Explanatory Note – Part I, para 84.

⁴³ The Special Maritime Procedure Law of the People's Republic of China (Chinese SMPL), effective 1 July 2000, s 29. The maritime court that arrested the ship shall order and conduct a judicial sale. Thus, whether the court addressed has jurisdiction to sell a ship should be considered when decreeing a sale.

⁴⁴ The Dutch Code of Civil Procedure (Dutch CCP), effective 29 March 1828, a 563.

⁴⁵ Yingfeng Shao, Laura Carballo Pineiro and Maximo Q. Mejia, Jr., 'Paving the Way to Recognising Foreign Judicial Sales of Ships: A Comparative Analysis of Judicial Sale Proceedings in Selected Jurisdictions' (forthcoming 2023 March) Cuadernos de Derecho Transnacional.

⁴⁶ Discussion about certificates will be made below in Section 3.4.

Worthy of mentioning, the explanatory notes prepared by the Working Group assert that the ship must sit within the territory when it is awarded to the purchaser, *i.e.*, at the time of sale conclusion.⁴⁷ Despite the apparent reasonableness of this view, it might not be followed in the application of the Convention, as the explanatory notes are not part of the Convention and thus lack binding force. Probably, original states would continue to follow their internal jurisdictional rules when conducting sales, and requested states, facing foreign sales, would not consider whether the time of sale contains or refers to the moment of sale conclusion.

2.3 Temporal scope of application

The Convention applies only to judicial sales ordered or approved after its entry into force in the sale state. After having three state parties, the Convention will be effective. 180 days after the date that a state deposits its instrument of ratification, acceptance, approval or accession, the Convention will enter into force in that state.⁴⁸ Hence, if an arrest for enforcement purposes was made before the Convention binds the sale state, the Convention can still apply to that sale so long as the sale itself is ordered or approved after the date that the Convention enters into force in the sale state.

2.4 Relational scope of application

This section explains the Beijing Convention's relation to other national or international legal instruments whereunder the international effects of judicial sales can also be decided.

The Beijing Convention follows the principle of *favour registrationis*. It will not displace other instruments which provide a more favourable basis for giving effect to foreign judicial sales.⁴⁹ However, if a foreign judicial sale would be denied effect upon grounds from a principal recognition proceeding in domestic law or other recognition procedures in various treaties, this Convention must apply to its full extent to grant recognition to that sale.⁵⁰ In practice, two scenarios may arise. First, a judge or other competent officer may examine and weigh several regimes whereunder the effects of a foreign judicial sale can be decided. If the recognition procedure under the Beijing Convention is more advantageous to the party seeking recognition, this Convention applies. Instead, if the procedure under another

⁴⁷ Explanatory Note – Part I, para 85.

⁴⁸ The Beijing Convention, Article 21 (1).

⁴⁹ The Beijing Convention, Article 14.

⁵⁰ Explanatory Note – Part III, paras 51-53.

instrument makes it easier for the party to obtain recognition, that instrument prevails. Alternatively, legislators might expound the situation in which the Beijing Convention necessarily prevails or gives way, so that judges need not decide case-by-case which regime better facilitates the party invoking recognition and thus shall be followed. In short, the Beijing Convention requires recognition to be given wherever possible, regardless of the legal source.

Notably, the principle of *favour registrationis* does not affect the recognition of judicial sales of Inland navigation vessels under the Convention on the Registration of Inland Navigation Vessels⁵¹ and its Protocol No. 2 concerning Attachment and Forced Sale of Inland Navigation Vessels. Those instruments, as a whole, prevail over the Beijing Convention.⁵²

3. Concluding a judicial sale that confers a clean title

3.1 The law applicable to judicial sales and the effects of sales

A judicial sale must be carried out following the law of the state where the sale occurred (*lex fori processus*), except for the matters prescribed in the Convention.⁵³ Given that the ship was situated within the sale state at the time of sale, one may also say that the sale is conducted pursuant to the *lex situs*.

In line with the philosophy of the Convention – refraining from interference with national law on judicial sales,⁵⁴ the matters subject to national law outnumber those governed under the Convention. The matters governed by the uniform Convention rules are as follows: the definition of judicial sales, the jurisdiction for sales, the effects of sales, and the notice to be sent prior to sales. As to the remaining sale matters concerning the initiation of the sale, the preparation of the sale and the sale itself, they are all subject to the *lex fori processus* as the uniform conflict rule under the Convention. Noteworthy, the technicalities of each of these matters may vary greatly from state to state.⁵⁵

⁵¹ 1281 UNTS 111.

⁵² See footnote 24 and its accompanying text.

⁵³ The Beijing Convention, Article 4 (1).

⁵⁴ Explanatory Note – Part I, para 3.

⁵⁵ For a comparison of national sale procedures, see Shao et al. ‘A Comparative Analysis of Judicial Sale Proceedings’ (n 45).

The effects of a judicial sale concluded under the Convention rules and the *lex fori processus* should be the conferral of a clean title on the purchaser. The term "clean title" means that the sale purges all pre-existing charges on the ship and consequently vests the ship's ownership in the purchaser clear of encumbrances. Notably, after a sale reaches completion,⁵⁶ additional formalities concerning the delivery of an asset may be required in some national legal orders in order to effect the ownership transfer, such as inscribing the judicial decision decreeing the transfer in the register.⁵⁷ Since the Beijing Convention is concerned with the ownership transfer via judicial sale and the recognition of that transfer, those formalities must be met as required by the *lex fori processus*.

3.2 Notification of judicial sales

Acknowledging the vital role of notice requirements in safeguarding the interests of creditors,⁵⁸ meanwhile wishing to strike a fair balance between an expedient judicial sale and due process accessible to all, the Convention imposes procedural requirements upon notice prior to sales.⁵⁹ These requirements embody four aspects: how to identify the persons entitled to notice, who these persons are, the methods of notification, and the content of notice.

The Convention allows the authority for sale to rely solely on the registered or filed information. Creditors are responsible for the risks of the inaccuracy of their contact information in the register or filed to the court.⁶⁰ In this sense, they cannot later challenge the sale on the ground of lack of proper notice, if the delivery of notice failed due to the inaccurate information recorded.

⁵⁶ Although there exist divergent national legal norms concerning the finality of a sale, such as "conclusive", "cannot be set aside", and "effective", these norms in fact have similar connotations in the context of judicial sales. Usually, after an adjudication or bill of sale is issued by the authority for the sale upon sufficient payment by the successful bidder, the sale becomes final. Examples can be found in: English law, see Roger Heward, 'England and Wales Part III. Judicial Sales of Vessels and Priority of Claims' in Christian Breitzke and Jonathan Lux (eds.), *Maritime Law Handbook* (Kluwer Law International BV 2019) 13; Dutch law, Dutch CPP, aa 570 (2) & 575 (6); Chinese law, Chinese SMPL, ss 38, 40, and the Provisions of the Supreme People's Court on Auction and Sale of Property in Civil Enforcement by the People's Court (Chinese Provisions on Civil Enforcement), Fa Shi [2004] 16, amended 23 December 2020, aa 20, 26.

⁵⁷ Dutch Book 3, a 301.

⁵⁸ Explanatory Note – Part II, para 1.

⁵⁹ *ibid*, para 3.

⁶⁰ The Beijing Convention, Articles 4 (7).

The law of the sale state decides the manner and form of notice delivery.⁶¹ Hence, who is responsible for sending a notice, the way to send a notice, the form of notice, and the timeframe for notification, are subject to the *lex fori processus*.⁶² As a matter of complementarity, the Beijing Convention does not derogate from the obligations of member states to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Convention).⁶³ Under the Beijing Convention, if the notice of judicial sale is to be transmitted abroad in accordance with the *lex fori processus*, the sale state, which is a member of the Service Convention, has to amend its national law to divert the notice of sale from the channels of transmission provided under the Service Convention.⁶⁴

Five groups of parties are entitled to receive notice before a sale. First, all registries in which ships are recorded,⁶⁵ including ship registries, commercial registries where mortgages and other charges are registered, and special registries for inland navigation ships.⁶⁶ Second, holders of mortgage, *hypothèque*⁶⁷ or registered charge.⁶⁸ This group is conditional upon the register's being open to public inspection (public access) and the extracts' being obtainable.⁶⁹ If the public cannot access a register, a failure to notify the parties recorded in that register does not constitute a breach of the notice requirement. The Working Group suggests that a fee for an extract or requiring the applicant to demonstrate its identity does not frustrate the availability of public access.⁷⁰ Third, the known holder of a maritime

⁶¹ *ibid*, Articles 4 (4).

⁶² Explanatory Note – Part II, para 23.

⁶³ 658 UNTS 163, adopted on 15 November 1965.

⁶⁴ Report of UNCITRAL 2022, para 69. This statement is made against the fact that the Service Convention is not mandatory. The law of the forum decides whether there is an occasion for a document to be transmitted abroad for service. See Hague Conference on Private International Law (HCCH), *The Practical Handbook on the Operation of the Service Convention*, 2016, 13. Hereinafter referred to as Handbook on Service.

⁶⁵ The Beijing Convention, Articles 4 (3) (a) and 2 (b).

⁶⁶ Explanatory Note – Part III, para 12.

⁶⁷ The Beijing Convention, Article 2 (d).

⁶⁸ “Charges” under Article 2 (e) of the Beijing Convention cover any property right, other than mortgages and *hypothèques*, on the ship. In contrast, “registered charges” under Article 2 (f) of that Convention only refer to the charges that are registered in the register where the ship is registered, or any other register where the mortgages and *hypothèques* are registered. Such a definition is partly for ensuring that the notification requirements under Article 4 are workable. See Explanatory Note – Part I, paras 56-60.

⁶⁹ The Beijing Convention, Articles 4 (3) (b).

⁷⁰ Explanatory Note – Part II, para 14.

lien.⁷¹ Under the new Convention, to be entitled to notice, a lienee is obliged to make itself known to the competent authority for sale by virtue of the procedures and regulations in the sale state. To that purpose, varying methods in national law are applicable, such as a fresh action commenced by the lienee, an intervention by the lienee in the action where the sale was ordered, or filing a caveat against the ship's release. Fourth, the ship owner when the notice is sent.⁷² And fifth, bareboat charterers and bareboat charter registries.⁷³

The content that a notice incorporates is prescribed in the Convention. Totally, fourteen items must be contained in the notice, as shown in the Convention's annexe I. Other than the time, place, potential effects and conducting authority of the sale, the notice shall show the necessary information on how relevant parties can make themselves heard and thus protect their interests in the sale proceeding. The Convention does not forbid state parties from adding other information to the notice.⁷⁴

3.3 Publication of judicial sales

Two types of publication must be made: announcement of the sale to the public, and transmission of the sale notice to the repository.

The Convention requires sales to be published in the press or other publication "available" in the sale state.⁷⁵ By announcement, general creditors to whom an individual sale notice is not given become aware of the sale; more importantly, potential bidders are informed of the forthcoming sale. Two options are given. First, the sale can be published in the press. Thus, if the *lex fori processus* allows, either the electronic or paper form publication will suffice for the notice requirements under the Convention. Second, the sale can be published in other broadcasting mediums "available" in the sale state. Whether the publication is published in the sale state or abroad does not matter.⁷⁶ So far as the publication can be accessed in that state, either an online publication or a paper publication circulated worldwide will be accepted.

⁷¹ The Beijing Convention, Articles 4 (3) (c).

⁷² The Beijing Convention, Articles 4 (3) (d).

⁷³ *ibid*, Article 4 (3) (e).

⁷⁴ The Beijing Convention, Articles 4 (4). Explanatory Note – Part II, paras 22-23.

⁷⁵ The Beijing Convention, Articles 4 (5) (a).

⁷⁶ Explanatory Note – Part II, paras 32.

The transmission of notice to the repository – is a novel method which does not exist in national sale proceedings.⁷⁷ The repository is a mechanism designed by the Convention for two purposes: first, providing public access to the instruments that must be circulated as required by the Convention, and second, promoting the dissemination of information on the sale so that the research concerning the maritime community may be facilitated and the integrity of judicial sales be maintained.⁷⁸ In practice, the repository will form a module of the Global Integrated Shipping Information System (GISIS). Noteworthy, apart from the notice of judicial sale, the certificate of judicial sale⁷⁹ and the decision on challenges against a sale will also be transmitted to the repository.⁸⁰

Unlike the international registry for aircraft objects⁸¹ under the Convention on International Interests in Mobile Equipment (Cape Town Convention)⁸² and the Protocol thereto on Matters Specific to Aircraft Equipment,⁸³ the function of the repository under the Beijing Convention is "informational".⁸⁴ On the one hand, "informational" means that publicity by publication on the repository is not one of the conditions the satisfaction of which leads to legal consequences pertinent to a substantive right, such as a property right. On the other hand, since the repository makes information about the sale available to worldwide interested parties who can access the repository from every corner of the globe, one may say that the publication on the repository serves the same function as and supplements the publication in the press or other publication available in the sale state.

GISIS is not bound to ensure the accuracy of the instrument transmitted for publication. As a general principle, the instrument will be published in the form and language in which it is received.⁸⁵ However, in the interest of communication, the

⁷⁷ The Beijing Convention, Articles 4 (5) (b).

⁷⁸ Explanatory Note – Part III, para 39.

⁷⁹ The Beijing Convention, Articles 5 (3).

⁸⁰ The Beijing Convention, Articles 11 (2). These two types of documents will be discussed later.

⁸¹ Under the regime of the Cape Town Convention and its protocol on aircrafts, publicity by registration in an international registry specifically established for this purpose is a condition to be met for obtaining an international interest the said regime provides. For an exposition of these matters, see Ole Böger, 'The Case for a New Protocol to the Cape Town Convention Covering Security over Ships' (2016) 5 (1) Cape Town Convention Journal 73, 77-79.

⁸² 2307 UNTS 285.

⁸³ 2367 UNTS 517.

⁸⁴ Explanatory Note – Part III, para 41.

⁸⁵ *ibid*, paras 41-43; UNCITRAL, *Report of Working Group VI (Judicial Sale of Ships) on the Work of Its Fortieth Session*, A/CN.9/1095, para 58. The entity in charge of the repository shall be the

sale notice must be translated if it is not issued in a working language of the repository.⁸⁶ The translation obligation only binds the minimum information as contained in annexe I, and the translation needs no certification.⁸⁷ It is believed that, by so regulating, even though the notice may be produced in divergent languages, at least parties worldwide can understand the essential information of the sale, which is published on the repository.

The Convention leaves the modalities of transmission to the repository to the procedural rules of the repository and the *lex fori processus*. Meanwhile, as a general guidance, the Convention states that the repository shall make the notice it receives available to the public in a timely manner so that relevant information can be disseminated promptly.⁸⁸

3.4 Certificates evidencing sales

Upon the completion of a sale which conferred a clean title in accordance with the *lex fori processus* and the uniform Convention procedural rules, a certificate evidencing the sale can be issued by the authority designated by the sale state for issuance.⁸⁹ Put in another way, four prerequisites to be met before a certificate can be issued, *viz.*, being, (i) the completion of a sale, (ii) the sale has conferred on the purchaser a clean title to the ship, (iii) the sale was carried out per the law of the state where the sale occurred, and (iv) the sale complied with the procedural requirements required in the Convention.

When a certificate is sought, the competent authority⁹⁰ for issuance follows its own procedures and regulations (*lex fori processus*) to decide whether or not the standards for issuance are met, as well as the formalities of issuance.⁹¹ Accordingly, issues concerning what matters are to be reviewed, whether a certificate can be issued *ex officio*, whether multiple certificates can be issued, whether the certificate

Secretary-General of the IMO or an institution named by the United Nations Commission on International Trade Law (the Beijing Convention, Articles 11 (1)).

⁸⁶ During the preparation of the Convention, the working languages of the repository were English, French and Spanish.

⁸⁷ Explanatory Note – Part II, paras 36-37.

⁸⁸ The Beijing Convention, Articles 11 (2).

⁸⁹ Explanatory Note – Part II, para 46.

⁹⁰ Such competence can be conferred on one or multiple authorities.

⁹¹ The Beijing Convention, Article 5 (1).

shall be served, the period of validity of certificates, and who can apply for certificates, are all subject to the *lex fori processus*.⁹²

A certificate can be issued electronically, in paper form, or both (multiple certificates),⁹³ according to the *lex fori processus*.⁹⁴ That said, Article 5 (6) of the Convention, modelled on the provisions in Article 9 of the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC Convention),⁹⁵ prescribes three requirements that electronic certificates must meet.⁹⁶ They are: (i) recordation, which means that information generated, communicated or stored by electronic means forms part of the record accessible for subsequent reference;⁹⁷ (ii) authenticity, which requires the use of a reliable method to identify the issuance authority;⁹⁸ and (iii) integrity, which guarantees that any alteration to the record after the time it was generated can be detected.⁹⁹

Given the increasingly engrained practice of issuing certificates for cross-border legal issues,¹⁰⁰ it is understandable that the Convention provides a model form in its annexe II. This form must be "substantially" used for the certificate of judicial sale,¹⁰¹ which means, although the sale state can use any language to fill in the form or have its own design for the certificate,¹⁰² certificates issued under the Convention are, to a large degree, standardised based on the information that must be included. Article 5 (2) of the Convention sets out the particulars a certificate should contain, which correspond to the model form's layout. They comprise information about the sale's condition and effects, and the ship's particulars.

⁹² Explanatory Note – Part II, para 45.

⁹³ *ibid*, para 65.

⁹⁴ The Beijing Convention, Articles 5 (1).

⁹⁵ UNTS 2898, No. 50525.

⁹⁶ Explanatory Note – Part II, para 66.

⁹⁷ The Beijing Convention, Articles 5 (6) (c).

⁹⁸ *ibid*, Article 5 (6) (a).

⁹⁹ *ibid*, Articles 5 (6) (b) & (c).

¹⁰⁰ Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law ECPIL Commentary Volume I Brussels Ibis Regulation 2016* (Verlag Dr. Otto Schmidt KG 2016) 827. A model form may increase the standardisation and acceptance of certificates produced abroad.

¹⁰¹ The Beijing Convention, Articles 5 (2).

¹⁰² Explanatory Note – Part II, para 52.

The content of certificates constitutes sufficient evidence of the matters incorporated therein.¹⁰³ The term sufficient, however, cannot be taken to mean the matters incorporated are conclusive or irrefutable; rather, it means that the court or authority seised should *prima facie* trust the certificate and not proceed to examine the foreign sale.¹⁰⁴

A signature or stamp of the authority issuing the certificate or other confirmation of the certificate's authenticity must be included.¹⁰⁵ In the interest of expediency, certificates and their translation¹⁰⁶ are exempted from legalisation¹⁰⁷ or similar formality.¹⁰⁸ Hence, apostilles under the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention),¹⁰⁹ and legalisation requirements in national law for certifying the authenticity of foreign documents,¹¹⁰ cannot apply.¹¹¹

The exemption of legalisation does not mean that the requirement to produce an authentic certificate can be waived. The recognising state can still examine whether the certificate satisfies authenticity in the state of origin, or in the context of an electronic certificate, whether the requirements under Article 5 (6) of the Convention for electronic certificates are met. The explanatory notes suggest that if an authority in the recognising state has doubts, it may communicate directly with

¹⁰³ The Beijing Convention, Article 5 (5).

¹⁰⁴ Explanatory Note – Part II, paras 61-62.

¹⁰⁵ The Beijing Convention, Articles 5 (2) (k).

¹⁰⁶ The recognising state can require a certificated translation of the certificate. The Beijing Convention, Articles 7 (3) and 8 (3).

¹⁰⁷ Legalisation often involves various authorities at different levels in both the state where the document was made and the state where it is to be produced. A usual procedure is that a consular or diplomatic agent in the latter state certifies the authenticity of the signature, the capacity of the signing person, and the identity of the seal or stamp on the document.

¹⁰⁸ The Beijing Convention, Article 5 (4).

¹⁰⁹ 527 UNTS 189.

¹¹⁰ Legalisation and similar formalities in respect of the recognition of foreign judicial sales can be found in many jurisdictions. Such as English law, see Simon Hartley, 'England and Wales Part II. Flag and Registration of Vessels and Mortgages in Vessels' in Christian Breitzke and Jonathan Lux (eds.), *Maritime Law Handbook* (Kluwer Law International BV 2019)15; Liberian law, see the Liberian Maritime Law (Liberian ML), Title 21 of the Liberian Code of Laws of 1956, s 102 (2) (b).

¹¹¹ Whether to avoid apostilles went through heated debates in preparing the Convention. Article 20 from the sixth revision of the "Beijing Draft" (the sixth revision can be found in UNCITRAL, *Draft Convention on the International Effects of Judicial Sales of Ships*, A/CN.9/1108) gave the state parties the option to apply the Apostille Convention for the certificate of judicial sale. After deliberation, broad support was expressed for deleting Article 20, as it was concerned that state parties to the Apostille Convention would be subject to more onerous formalities than those not being parties. Thus, the finalised draft convention deleted Article 20 from the text.

the foreign issuing authority¹¹² or refer to the certificate uploaded to the repository.¹¹³ If the certificate submitted is proven unauthentic or fails to meet the requirements for electronic certificates, the recognising state can deny that certificate and consequently refuse to give effect to the sale involved.

3.5 Exclusive jurisdiction to hear challenges against sales and certificates

Following the said, a chain of questions arises. In what circumstances can one challenge a certificate? Where can that challenge be made? What are the consequences of a successful challenge?

Under the Convention, the state conducting a sale has exclusive jurisdiction to hear cases regarding avoiding and suspending the effects of that sale, and those concerning challenges against the issuance of the sale certificate.¹¹⁴ Thus, the *lex fori processus* will decide the form of proceeding for avoidance or suspension, the standing to initiate a challenge, the grounds sufficient to substantiate a challenge, and the financial remedies, if any. Particularly important, in hearing a challenge against the sale or certificate, the sale state can, according to its own law, determine the consequences pertinent to non-compliance with the prerequisite for certificate issuance, such as the uniform notice requirements.¹¹⁵

The effects of avoidance or suspension are limited to the sale state.¹¹⁶ When a foreign country determines on the public policy exception under Article 10, the avoidance or suspension serves as a mere fact, *i.e.*, the court decision rendered by the sale state on avoidance or suspension does not bind the recognising state. In other words, if the registration state has already recorded the change of ownership upon production of a certificate, that state, facing an avoidance decision rendered by the sale state, can decide per its own law what to do next with the ship registration.

Considering the prevailing national practices regarding challenges against judicial sales, one may say that the exclusive jurisdiction is set forth more for the purpose of showing mutual trust between party states of the Convention than to be exercised in reality. The exclusive jurisdiction is concerned with the remedies available after

¹¹² The Beijing Convention, Article 12.

¹¹³ Explanatory Note – Part II, para 59.

¹¹⁴ The Beijing Convention, Article 9.

¹¹⁵ Explanatory Note – Part III, para 30.

¹¹⁶ The Beijing Convention, Article 15 (2).

the sale has been completed.¹¹⁷ While the remedies before completion commonly exist in numerous states, the remedies for a completed sale are exceptional. Admittedly, there is always a turning back in theory, *i.e.*, an exceedingly unusual review on grounds of substantial injustice; however, this may rarely happen in practice.

4. Recognition of the clean title abroad

With a sale certificate, the purchaser can seek recognition of its title to the ship in a foreign country under the framework of the Beijing Convention. In the following, after introducing the meaning of recognition, the procedure of recognition and the grounds for denial of recognition are enunciated one after another.

The Convention seems to ground on the theory of extension of effects that recognition means that the effects crystallised under foreign law are extended to the domestic legal system,¹¹⁸ as it mandates that a judicial sale can have effects abroad without being assimilated to a domestic sale in the recognising state.¹¹⁹ Based on the extension theory, the Convention attribute specific effects to the mutual recognition under its framework: when a foreign sale is recognised, the clean title, resulting from the sale pursuant to the law of the original state, will become valid and thus operate *erga omnes* in the recognising state. Accordingly, in that state, all interested parties in further proceedings are compelled to respect the property legal relations over the ship as modified by the sale. In short, a judicial sale will produce the same effects in the recognising state as in the original state.

The recognition under the Convention is a type of mutual recognition bearing substantive effects, which deals with legal relations or situations formed abroad. The basic rule of this mutual recognition is that if a legal situation or right has been crystallised through a law-oriented proceeding in one state, the others shall recognise that legal situation or right, regardless of applicable law rules, and presumably subject to public policy exception. Mutual recognition as such is enshrined in European case law and legislation.¹²⁰ On the international level,

¹¹⁷ Explanatory Note – Part III, para 29.

¹¹⁸ For a synopsis of recognition, see [Jürgen Basedow](#), *The Law of Open Societies - Private Ordering and Public Regulation in the Conflict of Laws* (Brill/Nijhoff 2015) 258-259.

¹¹⁹ The Beijing Convention, Article 6.

¹²⁰ In the EU, apart from the legal capacity of corporates and the name of individuals, whether the other legal facts and occurrences evidenced by public documents can be recognised solely on grounds of mutual recognition is unclear. See Jürgen Basedow, 'Vested Rights Theory', *Encyclopedia of Private International Law* (2017) 1813-1821, 1819.

typically, such recognition has applicability to the validity of marriages celebrated in a foreign state.¹²¹ In the Beijing Convention, what is subject to recognition is the effects of the judicial sale – a conferral of clean title.

4.1 Procedure of recognition

The Convention follows the principle of automatic recognition, also known as recognition *de plano* or *ipso iure*.¹²² Automatic recognition amounts to a presumption of authority and effectiveness subject to later rebuttal, and such presumption is feasible because the traditional proceedings for recognition as provided for in the law of the state addressed are removed. In other words, automatic recognition does not mean that judicial sales from foreign legal orders are given the same treatment as domestic sales. Instead, it defers the judicial intervention to a later moment when the foreign sale is relied upon, meanwhile dispensing with any prior proceedings under the national law. Under the Convention, foreign judicial sales are subject to two examinations: whether the certificate produced is authentic and whether a denial ground as envisaged by the Convention exists.¹²³ They work as follows: upon ascertaining that the certificate produced is authentic, the presumptive effects of the foreign sale as regards a clean title will be accepted until later rebutted when a denial ground is substantiated.

The procedure or technicality of these two examinations is subject to national law. An example may explain this well. In an action for wrongful interference against a person who denies the shipowner's title and arrests the ship, the shipowner who has obtained a Convention certificate from the sale state can petition to recognise its title. Upon the production of the certificate, the court has to, according to its own law, decide whether the recognition petition shall be treated as an incidental issue in the primary action, or the petition must be referred to a particular tribunal for such recognition while the primary action awaits. Likewise, when facing an application for deregistration of a ship, the registry, upon production of a certificate, must first look to its internal rule to identify the procedure of recognition for foreign sales. That procedure should answer: who is responsible for verifying the certificate's

¹²¹ The Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages, 1901 UNTS 131. See Basedow, *The Law of Open Societies* (n 118) 262; Dagmar Coester-Waltjen, 'Recognition of legal situations evidenced by documents', *Encyclopedia of Private International Law* (2017)1495-1505.

¹²² For discussions on automatic recognition, see Francesco Salerno, *The Identity and Continuity of Personal Status in Contemporary Private International Law (Volume 395)*, Collected Courses of the Hague Academy of International Law, para 71; Magnus et al. (n 100) 818.

¹²³ Grounds for denial of recognition will be discussed in the next subsection.

authenticity, and how to refer the case to the competent court if grounds for denial of recognition arise.

4.2 Grounds for denial of recognition

As stated above, the production of a certificate triggers automatic recognition; however, it does not guarantee it. If grounds for denying recognition are substantiated, the recognising state can rebut the presumptive effect given to the purchaser's title. Only one circumstance can lead to this rebuttal under the Convention – a public policy exception.¹²⁴ Put in another way, public policy is the sole reason to oust the otherwise applicable Convention regime whereunder the title conferred by a judicial sale is presumed to be effective in all member states.

Two methods are employed in the Convention to tame the "unruly horse"¹²⁵ of public policy, tackling the vagueness that might lead to the abusive application of the public policy exception. First, it sets a high threshold for public policy.¹²⁶ For a state to deny effect to a foreign sale, a court determination, which is not provisional or conditional, declaring that giving effect would be "manifestly" contrary to the public policy of this state, must be given.¹²⁷ By so regulating, a mere difference in municipal law between the original state (the state conducting the sale) and the recognition state cannot amount to a claim of public policy.¹²⁸ One may ask whether a failure to comply with the prerequisites for issuing a certificate under the Convention¹²⁹ can constitute an argument grounded in public policy. As far as this paper understands, it depends on which requirement is involved. For example, the Convention notice rules were not followed, but the national service rules somehow reached similar effects. The breach of the uniform rules would probably not be deemed as manifestly contrary to public policy. Contrarily, if the sale did not confer a clean title in the first place, such a case would perhaps trigger the public policy exception.

Second, in its explanatory notes, the Working Group lists typical examples illustrating the circumstances where public policy can be invoked in judicial sale cases, such as the procurement of a sale by fraud committed by the purchaser,

¹²⁴ The Beijing Convention, Article 10.

¹²⁵ *Richardson v Mellish* (1824) 2 Bing 229; 130 ER 294, 303.

¹²⁶ Draft Explanatory Note – Part III, para 38.

¹²⁷ The Beijing Convention, Article 10.

¹²⁸ Draft Explanatory Note – Part III, para 37.

¹²⁹ That said, the ship's presence within the territory is a criterion for the Convention as a whole to apply, so this one must be met in whatever case.

egregious procedural improprieties against due process, and the infringement of sovereignty.¹³⁰ Although the seized court can, at its discretion, interpret whether public policy is violated,¹³¹ the two methods explained above, to an extent, ensure that public policy as a last resort would not easily be triggered under the Convention.

5. Consequences of recognition

Two consequences ensue from acceptance of a foreign sale. First, the registry will deregister or re-register the ship at the purchaser's or subsequent purchaser's request.¹³² Second, the ship can no longer be arrested for the claims arising prior to the foreign sale.¹³³ Other than these two consequences of recognition prescribed in the Convention, the effectiveness of the clean title may also have binding force in other contexts. As stated earlier, once a foreign sale is recognised, the purchaser's title is binding on the recognising state against everybody, and in any further proceeding the validity of the title must be respected.

5.1 Change of registration

A registry¹³⁴ must take four actions upon production of a certificate: (i) deleting any mortgages or *hypothèques* and any charges that were registered before completion of the judicial sale;¹³⁵ (ii) deleting the ship from the register and issuing a deletion certificate;¹³⁶ (iii) re-registering the ship in the name of the purchaser or subsequent purchaser;¹³⁷ and, (vi) updating the register with particulars in the certificate of judicial sale that are not concerned with deregistration or re-registration.¹³⁸ These

¹³⁰ Explanatory Note – Part III, para 36.

¹³¹ *ibid*, para 38.

¹³² The Beijing Convention, Article 7.

¹³³ *ibid*, Article 8.

¹³⁴ As mentioned previously, the Convention covers registries other than those specifically for seagoing ships. Therefore, authorities who maintain records of the rights on ships, such as a commercial registry where mortgages are registered, or an authority for recording inland navigation ships, are also bound to take prescribed actions. Besides, although the primary concern of the Convention is the international effects of judicial sales, the Convention is also applicable when a registry faces sales conducted by authorities of its own state.

¹³⁵ The Beijing Convention, Article 7 (1) (a).

¹³⁶ *ibid*, Article 7 (1) (b).

¹³⁷ *ibid*, Article 7 (1) (c).

¹³⁸ *ibid*, Article 7 (1) (d).

actions are non-cumulative. Where applicable, a registry can take one or more actions at the purchaser's or subsequent purchaser's request. Two matters need extra attention. First, the re-registration under action (iii) does not mean registering the ship in a new state. Second, the term "subsequent purchaser" alludes to the purchaser who purchases the ship from the purchaser named in the certificate of judicial sale issued according to the Convention rules.¹³⁹ While the Convention's rules only address the subsequent purchaser, the competent authority can, according to its domestic law, take action if requested by a purchaser further down the chain of transfers.

Besides, actions to be taken by the bareboat charter registry – deleting bareboat charter registration are also required. Such deletion only terminates the flag state's permission to temporarily fly its flag, while not affecting the bareboat charterer's personal claim against the former shipowner.¹⁴⁰

The prescribed actions will follow the regulations and procedures of the registration state. Hence, matters such as how the subsequent purchaser shall establish its title for registration purposes are subject to the law of the registration state. The Convention does not prevent a registry from requiring the purchaser first to be registered as the owner to pass down the title to the subsequent purchaser. Likewise, although the Convention states that actions are taken upon request by purchasers, a registry can otherwise act on its own motion according to national law. Furthermore, by virtue of its domestic law, a registry can require the party seeking recognition to produce a certified copy of the sale certificate for its records.¹⁴¹

Notably, national regulations and procedures cannot be relied on to deny the purchaser or subsequent purchaser the right to seize the competent authority, nor can they be applied in a manner that detrimentally affects the Convention duty to give effect to the title certified by the certificate.¹⁴² Hence, after ratification, some states may need to amend their national rules in relation to registration changes following a judicial sale. Arguably, both the purchaser and the registry may be aided by the expediency and straightforwardness of the Convention recognition regime. For individuals, they could expect a faster proceeding for registration change, while for registries, they might face fewer legal liabilities resulting from the possible error in the application of complicated deregistration procedures.

¹³⁹ *ibid*, Article 2 (j).

¹⁴⁰ *ibid*, Article 15 (1) (b).

¹⁴¹ *ibid*, Article 7 (4).

¹⁴² Explanatory Note – Part III, paras 13-16.

5.2 No arrest of the ship by previous creditors

"Arrest" under the Convention alludes to arrest and another similar measure, such as *saisie conservatoire* in French law or attachment in American maritime law.¹⁴³ It is an interim measure different from a seizure in enforcement proceedings.¹⁴⁴ Restrictive actions that do not involve a ship's physical detention are not arrests.¹⁴⁵

Two scenarios in respect of arrest are envisaged: upon production of the sale certificate, a ship arrested for a claim arising prior to a judicial sale of the ship shall be released,¹⁴⁶ or a petition for ship arrest based on such a claim shall be dismissed. The procedures for performing these two scenarios are subject to the law of the state where the issue arises. It is worth mentioning that both scenarios refer to action by a court or other judicial authority, such that the Convention aligns with the existing treaties on ship arrest.¹⁴⁷

Notably, the Convention does not interfere with personal claims against the shipowner or whoever owned proprietary rights in the ship before the sale.¹⁴⁸ Thus, the judgment creditor may apply for enforcement against the other asset of the debtor.

Sections 3-5 show that the Convention creates a new solution to deal with the international effects of judicial sales. With two advantages – convenience and consistency, this solution may bring greater legal certainty as regards judicial sales.

First, the Convention approach is convenient to the extent that the recognition is subject to minimum criteria and the consequences of recognition are defined. Under the Convention, recognition is automatically given to foreign judicial sales concluded in accordance with the law of the sale state and the uniform procedural requirements. So far as an authentic document required for such recognition – a sale certificate – can be produced, the clean title in question will be *prima facie* accepted. Public policy is the only ground to rebut that acceptance, and its threshold is so high that a court decision holding that recognition would manifestly breach the public policy in the forum must be obtained. Two particular consequences following recognition with regard to the ship registration and the ship arrest by previous

¹⁴³ For a discussion on maritime interim measures, see William Tetley, 'Arrest, Attachment, and Related Maritime Law Procedures' (1999) 73 Tul L Rev 1895.

¹⁴⁴ Footnote 22 and its accompanying text.

¹⁴⁵ UNCITRAL, 'Compilation of Comments on the Draft Convention on the International Effects of Judicial Sales of Ships', A/CN.9/1109, 20.

¹⁴⁶ The Beijing Convention, Article 8 (2).

¹⁴⁷ The Arrest Convention 1999, Article 1 (5): "court" means any competent judicial authority of a state.

¹⁴⁸ The Beijing Convention, Article 15 (1) (b).

creditors are prescribed so that parties involved, whether individuals or public authorities, are fully aware of what they can and cannot do. Less confusion and friction would arise in that respect.

Second, the Convention approach is consistent on the basis that it would generally override other relevant instruments and be applied at large when a party wants to rely on a foreign judicial sale. The Convention follows the principle of *favour registrationis* in circumstances where more than one instrument concerning the international effects of judicial sales is applicable. Given its automatic nature, the simple recognition procedure under the Convention may apply in most cases where the effects of foreign judicial sales are to be decided.

From the viewpoint of shipping, this convenient and consistent recognition approach may benefit various business interests. Shipowners, ship financiers, service providers, and seafarers, unanimously value the public well-being of shipping, which is subject to smooth registration change processes, the finality of litigation, and a high sale price.¹⁴⁹ Since all these issues are addressed in the Convention, it seems reasonable to predict that the new instrument would be advantageous to multitudinous commercial interests in shipping industries.

6. Potential challenges the Convention may face

The potential challenges the Convention may face can be measured from a multitude of viewpoints. Countries with different legal systems will consider the changes to be made in their laws if the Convention enters into force. Common law jurisdictions usually consider ship arrest as constructive notice to the world¹⁵⁰ and make creditors responsible for keeping themselves informed of what happened to the ship. Hence, the uniform notice rules might be deemed onerous for those states. Considering the substantial changes to be made in their laws, they might consider the uniform procedural requirements upon the public authority for sale as outweighing the benefit of great legal certainty under the Convention. Accordingly, they would be less interested in ratification. The success of a new convention depends on a great many factors, not the least of which is how many countries ratify the Convention, and which countries ratify it.¹⁵¹ If the Beijing Convention meets a cold shoulder in

¹⁴⁹ UNCITRAL, *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, 4.

¹⁵⁰ William Tetley and Robert C. Wilkins, *Maritime Liens and Claims* (International Shipping Publications 1998) 1103.

¹⁵¹ Michael F. Sturley, 'Transport Law for the Twenty-First Century: An Introduction to the Preparation, Philosophy, and Potential Impact of the Rotterdam Rules' in D Rhidian Thomas

common law countries, its fruitfulness as a treaty would be limited. Consequently, despite its convenient and consistent character, it could not do better justice to the recognition of foreign judicial sales.

This speculative concern however may turn out to be redundant. During the deliberation for notice rules, delegates from a common law country – Singapore, asserted that each Convention entailed changes to be made in municipal law and it was impossible to avoid interference with national sale procedures.¹⁵² It is likely that other jurisdictions rooted in common law may also be receptive to the uniform notice rules.

Another challenge the Convention may encounter concerns the material scope of the Convention. With respect to forced sales by which maritime claims are enforced, the Convention addresses only limited types of them. Several vital ones are omitted from the Convention. For example, as a long-established common law practice, the mortgagee's power of sale, without judicial intervention,¹⁵³ reflects an important strand of those enforcement tools. However, this type of forced sale is not taken into account by the Convention. Even in respect of judicial sales, those allowing charges to continue to attach to the ship after the sale, for example, qualified sales that do not confer clean title, like in the MLM Convention 1993, or sales not ordered under admiralty jurisdiction, if in English law, are deliberately left out of the Convention. In view of these facts, one may criticise that the implication of the new Convention on the law concerning the enforcement of maritime claims is limited; a treaty with a broader scope should be created.

To that possible criticism, this paper suggests that ratification is a better choice than keeping the *status quo*. The matters unaddressed can always be dealt with later. Accepting the new Convention for the time being will not obstruct a harmonisation of those matters in the future. Perhaps, instead of waiting for a comprehensive solution taking into account all problems, dealing with a part of them would be more advantageous to parties facing problems at present.

(ed), *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules* (Lawtext Publishing Limited 2009) 1-33, 32.

¹⁵² The author, as an observer, attended the sessions held by the Working Group VI of UNCITRAL for its work concerning the Beijing Convention.

¹⁵³ Such a sale is aided by the admiralty marshal for matters like appraisal and publication, but the proceeds will not go through a distribution process. See Christopher Hill, *Maritime Law* (6th Edition, London: LLP) 39-40.

7. Conclusion

The Beijing Convention deals with the international effects of judicial sales. With two conspicuous advantages, the Convention recognition approach may do better justice to the cross-border circulation of title perfected via judicial sale, bringing greater legal certainty to the benefits of various business interests in shipping industries. As to the challenges the Convention may meet, they include the potential reluctance of common law states to ratify the Convention and a possible criticism with regard to the limited types of forced sales covered by the Convention. However, as far as this paper is concerned, the speculative concern about common law countries may be unnecessary, and a partial achievement is better than none.

At this stage of the process, facing the adoption of the Convention by the General Assembly, the task is a stark one – deciding whether to ratify. In view of the legal certainty that may be brought by the convenient and consistent approach under the new regime, on the one hand, and the very nature of a treaty as a compromise, on the other hand, ratification is supported.



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