

## A NEWCOMER TO MARITIME LAW: THE BEIJING CONVENTION ON THE INTERNATIONAL EFFECTS OF JUDICIAL SALES OF SHIPS

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**Abstract** On 7 December 2022, the United Nations General Assembly adopted a treaty known as the Beijing Convention governing the recognition abroad of the international effects of judicial sales of ships. This article explores the rationale for a specific Convention on this issue, and its interaction with other relevant international conventions. It then analyses the recognition approach adopted by the Convention and evaluates its potential strengths and weaknesses. While some provisions might need further consideration, the overall conclusion is that the Beijing Convention has the potential to strengthen the legal certainty of the purchaser's title obtained via this sale mechanism and thus help debt recovery. Although common law jurisdictions might find it at odds with some of their features, the expected benefits from ratifying it seem to outweigh these issues and are already prompting a steady number of signatures, including those of China, the European Union and Singapore.

**Keywords:** private international law, judicial sale of ships, Beijing Convention, maritime liens, recognition methods.

### I. INTRODUCTION

Legal certainty is essential to international transportation and the reason why significant efforts have been made to harmonise divergent national legal rules on shipping as the principal mode of transportation in global trade.<sup>1</sup> A new convention in this respect was concluded in 2022. Under the auspices of the United Nations Commission on International Trade Law (UNCITRAL),<sup>2</sup> the Convention on the International Effects

<sup>1</sup> For a synopsis of the conventions governing maritime matters, see F Berlingieri, *International Maritime Conventions: Navigation, Securities, Limitation of Liability and Jurisdiction* (Taylor & Francis 2014) vol 2.

<sup>2</sup> UNCITRAL, 'Draft Explanatory Note on the Convention on the International Effects of Judicial Sales of Ships – Part I' (11 May 2022) UN Doc A/CN.9/1110, para 3 (Explanatory Note – Part I).

of Judicial Sales of Ships, also known as the Beijing Convention, was concluded in New York<sup>3</sup> and later adopted by the United Nations (UN) General Assembly on 7 December 2022.<sup>4</sup> As of July 2024, 27 States had signed the Convention, and El Salvador had ratified it.<sup>5</sup> It requires ratification by three States to enter into force.

In general, the judicial sale of a ship is an enforcement measure available when shipowners fail to meet their financial obligations. With the completion of such a sale, charges of any kind over the ship cease to attach to that ship and pass onto the proceeds of sale, which are later distributed among various creditors. The successful bidder thus obtains ownership free of encumbrances.<sup>6</sup> As ‘the eye of the hurricane where it is apparent that the air is undisturbed’,<sup>7</sup> it is a pivotal principle in contemporary maritime law that a judicial sale transfers a clean title valid against everyone in the world.<sup>8</sup>

However, given the principles of national jurisdiction, the effects of a judicial sale could be denied abroad. Buyers may not only face difficulties in registering the transfer of an acquired ship but may also be challenged as regards the validity of their title before foreign courts. Such actions have been brought in several States over the last five decades.<sup>9</sup> Legal uncertainty of judicial sales is a problem in practice, hazardous to the general well-being of international maritime trade, and thus warranting a solution on the international level.

<sup>3</sup> UN General Assembly, ‘Report of the United Nations Commission on International Trade Law’ (3 August 2022) UN Doc A/77/17 (Report of UNCITRAL 2022) 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.

<sup>4</sup> The Six Committee (Legal), on 7 November 2022, at its 34th meeting, approved the draft resolution without a vote. This resolution was then adopted by the General Assembly on 7 December 2022: UN General Assembly, ‘United Nations Convention on the International Effects of Judicial Sales of Ships’ (7 December 2022) UN Doc A/RES/77/100, 1 (Beijing Convention).

<sup>5</sup> A ceremony for its signature, ratification or accession was held in Beijing, China, on 5 September 2023. In all, 15 States signed at this ceremony: Burkina Faso, China, Comoros, El Salvador, Grenada, Honduras, Kiribati, Liberia, Sao Tome and Principe, Saudi Arabia, Senegal, Sierra Leone, Singapore, Switzerland and Syria. The United Republic of Tanzania (21 September 2023), Ecuador (17 November 2023), Belgium and the EU (14 March 2024), Luxembourg (25 April 2024) and Antigua and Barbuda, Côte d’Ivoire, Croatia, Cyprus, Italy, Malta and Spain (19 June 2024) have since signed the Convention, and El Salvador ratified it on 23 May 2024, becoming the first party to the Convention. For the latest status, see UNCITRAL, ‘Status: United Nations Convention on the International Effects of Judicial Sales of Ships (New York, 2022) <<https://uncitral.un.org/en/judicialsaleofships/status>>.

<sup>6</sup> That said, in some national jurisdictions, such as Germany, a judicial sale may allow certain charges to continue to attach to the ship after the sale.

<sup>7</sup> G Gilmore and JCL Black, *The Law of Admiralty* (Foundation Press 1975) 787.

<sup>8</sup> For common law, see WW Spicer, ‘Court-Ordered Sale of Vessels’ (1979–1980) 11 *JMarL&Com* 239; for civil law, see G Berlingieri, ‘Italy Part III. Judicial Sales of Vessels and Priority of Claims’ in C Breitzke and J Lux (eds), *Maritime Law Handbook* (Kluwer Law International BV 2019); for Chinese law, see M Sachs and Y Sun, ‘China Part III. Judicial Sales of Vessels and Priority of Claims’ in Breitzke and Lux, *ibid*.

<sup>9</sup> The Comité Maritime International (CMI) has published a list of these cases; see CMI, ‘List of Case Summaries’ <<https://comitemaritime.org/work/judicial-sale-of-ships>>. This non-exhaustive list covers 17 typical cases from various States with differing legal traditions, particularly common and civil law traditions. Although the number of cases in the CMI list is relatively small, they represent a very common legal problem.

The preparation for the Convention was ‘a long and arduous business’,<sup>10</sup> like all other conventions on transportation law.<sup>11</sup> The original project was undertaken by the Comité Maritime International (CMI) which approved the text of an instrument concerning cross-border issues related to the judicial sale of ships in June 2014, following six years of deliberation. That instrument was adopted by UNCITRAL Working Group VI (the Working Group) in 2018 and used as the basis for its future work.<sup>12</sup> At its fifty-third session in 2020, UNCITRAL concurred with the Working Group’s suggestion that only a convention could ensure the international effects of judicial ship sales.<sup>13</sup> Over the following four sessions from 2020 to 2022, the Working Group considered several issues, for instance, the relevance of obtaining a clean title and thus extinguishing all previous claims to the judicial sale; the key role in this process of the sale notice as well as other publicity methods such as relying on an online repository with potential global reach; and the usefulness of a standard certificate attesting compliance with the Convention’s requirements issued by the court conducting the sale or any other designated authority in the State of judicial sale.<sup>14</sup> After six revisions, the text of the Beijing Convention was finalised and approved by UNCITRAL, which then remitted it to the 77th General Assembly for adoption.

In the preambular paragraphs of its resolution adopting the Beijing Convention, the General Assembly acknowledged the crucial role of shipping in international trade and transportation, the high economic value of ships used in both inland and seagoing navigation, and the function of judicial sales as a principal means to enforce claims over ships. It noted that the power of uniform rules to give international effects to judicial sales could increase sale prices, to the benefit of all commercial interests in the maritime sector.<sup>15</sup>

The Beijing Convention is not the first attempt to enhance the legal certainty of judicial sales by seeking universal respect of purchase titles. The maritime law community has established three conventions aimed at ensuring uniformity in ship mortgages and maritime liens<sup>16</sup> that also address the effects of judicial sales.<sup>17</sup> Additionally, the

<sup>10</sup> R Goode, ‘From Acorn to Oak Tree: The Development of the Cape Town Convention and Protocols’ (2012) 19 *UnifLRev* 599.

<sup>11</sup> For example, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (adopted 11 December 2008) (2 February 2009) UN Doc A/RES/63/122, known as the Rotterdam Rules. See MF Sturley, ‘Transport Law for The Twenty-First Century: An Introduction to the Preparation, Philosophy, and Potential Impact of the Rotterdam Rules’ in DR Thomas (ed), *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules* (Lawtext Publishing Limited 2009).

<sup>13</sup> *ibid*, para 16.

<sup>14</sup> *ibid*, para 18.

<sup>15</sup> Beijing Convention (n 4) preamble.

<sup>16</sup> The Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 1926 (adopted 10 April 1926, entered into force 2 June 1931) Registration No 2765 (MLM Convention 1926); The Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 1967 (adopted 27 May 1967, not in force) (MLM Convention 1967); The Geneva Convention on Maritime Liens and Mortgages, 1993 (adopted 6 May 1993, entered into force 5 September 2004) 2276 UNTS 39 (MLM Convention 1993).

<sup>17</sup> *ibid*; MLM Convention 1926, art 9 governs the outcome of a judicial sale in connection with maritime securities, whereby a judicial sale shall purge maritime liens. MLM Convention 1967, art 11 governs the effects of a judicial sale regarding the transfer of title, whereby upon the conclusion of a sale, all encumbrances of whatsoever nature cease to attach to the ship, unless otherwise agreed between the buyer and creditor. MLM Convention 1993, art 12 crystallises the principle that a judicial ship sale purges all charges over the ship and vests in the buyers a clean title.

Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Judgments Convention) also covers the effects of a foreign judicial sale.<sup>18</sup> To provide a full overview of the international legal framework in these matters, Section II examines the Beijing Convention's interaction with other international instruments, exploring their limitations and the necessity of a new approach. Section III then turns to the Convention itself and identifies its potential strengths and weaknesses. Finally, the article concludes with an evaluation of the effectiveness and efficacy of the new treaty.

## II. MAKING THE CASE FOR ANOTHER INTERNATIONAL CONVENTION ON JUDICIAL SALES OF SHIPS

In October 2016, the vessel *MV Bright Star* was sold by a Jamaican court. Although the court did not recognise a Maltese mortgage as a privileged maritime claim in the sale proceeding, it reserved US\$3,000,000 specifically for satisfying the mortgagee. However, instead of complying with Jamaican procedural formalities, the mortgagee arrested the vessel in Maltese waters in June 2018. The Maltese Court of Appeal decided in February 2019 that the ship had not been sold free and unencumbered in Jamaica and that the interests of the Maltese mortgagee had not been satisfactorily protected as required by Maltese law, and thus declared the ship arrest valid and effective allowing another judicial sale by the mortgagee in Malta—to the dismay of the purchaser in the Jamaican proceedings.<sup>19</sup>

Such cases continue to occur periodically even though some international instruments have attempted to regularise the effects of judicial sales of ships. The Geneva Convention on Maritime Liens and Mortgages (MLM Convention 1993)<sup>20</sup> has the effect of conferring a clean title to the ship on the purchaser if the sale is conducted according to its requirements.<sup>21</sup> However, this Convention does not address how to ensure the validity or effectiveness of the title in a State party other than the State of judicial sale, leaving recognition matters to national law<sup>22</sup> and thus giving rise to legal divergence, as well as a gap in the protection granted to the ship's purchaser.

<sup>18</sup> Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters [2022] OJ L187/4 (adopted 2 July 2019, entered into force 1 September 2023) (Judgments Convention).

<sup>19</sup> Note that this decision on the legitimacy of the ship arrest, made by the Maltese Court of Appeal, was only the start of a judicial saga, which recently ended with a final judgment delivered on 12 January 2023 (*Ann Fenech Nominee v Jebmed Srl* (The Bright Star) [2023] App Civ 846/18/2). In that final judgment, the Maltese Court of Appeal upheld the ruling of the court of first instance (*Ann Fenech Nominee v Jebmed Srl* (The Bright Star) [2021] 846/2918), declaring that the Jamaican judicial sale should be respected in Malta and the Maltese mortgage had been transferred to the proceeds after the sale. Thus, although the five-year judicial process ended in favour of the purchaser, tremendous amounts of time and money were wasted. See also A Fenech, 'UN Convention on the International Effects of Judicial Sales of Ships' (2022) 28 *JIML* 363; M Agius, 'World First as Court Says Ship's Malta Mortgage Overrides Foreign Auction' *MaltaToday* (San Gwann, Malta, 11 February 2019).

<sup>20</sup> The MLM Convention 1926 (n 16) only provides for the effects of judicial sales in the context of a domestic sale, and the provisions addressing judicial sales in the MLM 1967, a treaty not yet in force, were further developed by its successor the MLM Convention 1993.

<sup>21</sup> Unless otherwise agreed between the purchaser and the mortgagee, MLM Convention 1993 (n 16) art 12(1).

<sup>22</sup> There is a provision requiring closing a ship's registration after its sale; however, this provision is hard to apply in practice because of a lack of unification of criteria for granting effect to the judicial

This gap could have been closed by the Judgments Convention. However, in a preliminary document to the discussion on the Beijing Convention,<sup>23</sup> UNCITRAL concluded that the judicial sale procedure did not involve a judgment on the merits and thus was not covered by the Judgments Convention.<sup>24</sup> The rationale of that opinion is based on a distinction between the judgment which triggers the enforcement proceeding ending in the judicial sale of the ship and the court decision made in that enforcement proceeding which confers the purchaser's title. According to the UNCITRAL report, the latter would not be considered a judgment on the merits covered by the Judgments Convention. This view is, nevertheless, not entirely persuasive to the extent that enforcement proceedings also involve decision-making and are thus judgments that can be considered as dealing with the merits and not just procedure.<sup>25</sup> This seems to be the case for judicial sales of ships, which require determining the property upon a ship as well as any outstanding claims against that ship, the transfer of property as a result of the sale, and claim settlement against the proceeds of the sale. In line with other judgments delivered during enforcement proceedings,<sup>26</sup> this would qualify a court decision ordering a judicial sale as a judgment on the merits and thus it would be covered by the Judgments Convention.

UNCITRAL's stance that the Judgments Convention does not apply may well be motivated by its desire to encourage the ratification of the Beijing Convention, because it is specifically designed for the circumstances of judicial ship sales rather than being a general procedure for recognition of all types of judgments, and also to avoid divergence if two different regimes are applicable. Moreover, despite similar effects, the nature of a judgment ordering the transfer of a ship's ownership can vary, being either *in rem* or constitutive, depending upon the State carrying out the sale.<sup>27</sup> Furthermore, not all judicial sales are conducted by courts; instead, some States mainly use public notaries for this purpose, who produce authentic documents for those sales.<sup>28</sup> It is thus preferable to treat recognition of judicial sales separately from the recognition of foreign judgments.

sale. After all, no registry will accept a foreign judicial sale without any scrutinisation: MLM Convention 1993, *ibid*, art 12(5).

<sup>23</sup> UNCITRAL, 'Interaction between a Future Instrument on the Judicial Sale of Ships and Selected HCCH Conventions' (12 September 2019) UN Doc A/CN.9/WG.VI/WP.85, paras 5–7.

<sup>24</sup> The Judgments Convention (n 18) applies to the recognition and enforcement of judgments in civil or commercial matters, whatever the nature of the court, not affected by the nature of the parties. However, it does not apply to revenue, customs or administrative matters. Under the Convention the term judgments means any decision (including non-monetary) on the merits given by a court, whatever the decision may be called, including a decree or order. See F Garcimartin and G Saumier, *Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (HCCH Permanent Bureau 2020) Part III, Ch I (Explanatory Report on Judgments Convention).

<sup>25</sup> A Zeuner and H Koch, 'II. General Effects of a Judgment' in *International Encyclopedia of Comparative Law Online* <[https://referenceworks.brillonline.com/entries/international-encyclopedia-of-comparative-law-online/\\*-COM\\_160902](https://referenceworks.brillonline.com/entries/international-encyclopedia-of-comparative-law-online/*-COM_160902)>.

<sup>26</sup> The doctrine that court decisions delivered during enforcement proceedings can be judgments on the merits has already been asserted on different occasions by the Spanish Supreme Court (eg in Judgment No 649/2022, of 6 October, ECLI:ES:TS:2022:3504) on the basis of arts 400(2) and 222 of the Spanish Civil Procedure Law.

<sup>27</sup> YF Shao, LC Pineiro and MQ Mejia Jr, 'Recognition of Foreign Judicial Sales of Ships and Private International Law' (2022) 3 JIML 166.

<sup>28</sup> *ibid*.

In any case, once in force the Beijing Convention would not contradict the Judgments Convention but rather work in conjunction with it to allow for a purchaser's title to be recognised in another State. Both conventions operate on the basis of the *favor recognitionis* principle,<sup>29</sup> meaning that the most favourable regime will apply where both (or any other treaty) are applicable to the same case.<sup>30</sup> Given the Beijing Convention's very purpose is providing for recognition of title abroad it is very likely to be the prevailing treaty in such a scenario. In addition, under the Judgments Convention, the procedure for recognition is complex. A connection with the State of origin must be established,<sup>31</sup> multiple documents are to be produced,<sup>32</sup> and a special procedure for the recognition and enforcement of foreign judgments as governed by the law of the recognising State must be complied with.<sup>33</sup> There are also various grounds for the refusal of recognition.<sup>34</sup> In contrast, the Beijing Convention streamlines recognition procedures in national law while minimising grounds for refusal, thus rendering it the easier and more suitable regime to apply, as the next section will highlight.<sup>35</sup> Nevertheless, it should be noted that the Beijing Convention does not cover judicial sales unable to confer clean title, and thus the Judgments Convention might be applicable in such cases, if judgments of this type are eventually considered to be covered by it.

### III. RECOGNITION OF FOREIGN JUDICIAL SALES UNDER THE BEIJING CONVENTION

#### *A. Scope of Application*

The Beijing Convention asserts its application to the international effects of judicial sales of ships that confer a clean title on the purchaser.<sup>36</sup> Accordingly, it does not address domestic cases, though it should be noted that the Convention aligns some procedural requirements of domestic sale proceedings to facilitate the recognition stage abroad. Furthermore, it only covers certain types of judicial sales, depending on the type of

<sup>29</sup> Beijing Convention (n 4) art 14. Judgments Convention (n 18) art 23(3): 'This instrument shall not affect the application of a treaty concluded after it for the purpose of granting or refusing recognition of a judgment. The prevalence of the later convention is not limited by the *favor recognitionis* principle; instead, general requirements of incompatibility between treaties apply.' See Explanatory Report on Judgments Convention (n 24) para 379.

<sup>30</sup> The same applies to 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 (Brussels I Recast) whose art 71 governs the relationship with conventions on similar matters such as the Beijing Convention. Ch IV thereof deals with the enforcement of authentic documents and court settlements in a similar manner to how the Beijing Convention deals with the recognition of judicial sales of ships abroad. However, given the concerns noted above on the nature of a judgment in a judicial sale procedure, when such judgment is presented for recognition, it is Ch III of Brussels I Recast on the recognition of judgments that should be examined to assess which convention is the more favourable regime.

<sup>31</sup> Judgments Convention (n 18) arts 4–6.

<sup>32</sup> *ibid.*, art 12.

<sup>33</sup> *ibid.*, art 13.

<sup>34</sup> *ibid.*, art 7.

<sup>35</sup> The Beijing Convention uses automatic recognition, as will be discussed further in Section III. For discussions on automatic recognition, see F Salerno, *The Identity and Continuity of Personal Status in Contemporary Private International Law (Volume 395)*, Collected Courses of the Hague Academy of International Law (Brill 2019) para 71; U Magnus and P Mankowski (eds), *European Commentaries on Private International Law. Commentary: Brussels Ibis Regulation* (Verlag Dr. Otto Schmidt KG 2016) 818.

<sup>36</sup> Beijing Convention (n 4) art 1.

assets subject to the sale,<sup>37</sup> the procedure used to perform the sale,<sup>38</sup> and the legal consequences of the sale.<sup>39</sup>

In relation to the type of asset being sold, ships of all kinds are covered by the Convention, including seagoing and inland navigation ships,<sup>40</sup> as well as commercial and pleasure watercraft, provided that they are registered in a registry open to public inspection regardless of where it is located.<sup>41</sup> The sale should follow a ship's arrest or other similar measure<sup>42</sup> pursuant to the law of the State selling the ship.<sup>43</sup> While these criteria already exclude warships and ships owned or operated by States for non-commercial governmental service, Article 3(2) of the Convention still reiterates its non-applicability to such vessels.<sup>44</sup> The Convention also does not apply to judicial sales of ships where the proceeds become government revenue rather than being distributed amongst creditors, such as those where the ship is sold as a criminal sanction.<sup>45</sup>

The procedure of a judicial sale must exhibit two features for the Convention to apply. First, the sale shall be conducted under judicial intervention, pending or after a judgment.<sup>46</sup> A sale under contractual or statutory power is excluded. As an illustration, the long-established common law practice of the mortgagee's power of sale<sup>47</sup> is not covered because it proceeds without judicial intervention. Similarly, a

<sup>37</sup> *ibid*, arts 2(a), 2(b).

<sup>38</sup> *ibid*, art 2(a)(i).

<sup>39</sup> *ibid*, art 1.

<sup>40</sup> Inland navigation vessels may fall outside the scope entirely, as art 13 of the Beijing Convention requires its provisions to give way to other conventions concerning inland navigation vessels.

<sup>41</sup> Beijing Convention (n 4) art 2(f). The registry here alludes to ship registries as well as equivalent public authorities that maintain records of ships.

<sup>42</sup> UNCITRAL has stated that arrest as understood in the Beijing Convention is the same as in the International Convention on Arrest of Ships, 1999 (adopted 12 March 1999, entered into force 14 September 2011) 2797 UNTS 3. The latter's art 1(2) 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' (13 May 2022) UN Doc A/CN.9/1110/add.2 (Explanatory Note – Part III) para 23.

<sup>43</sup> Beijing Convention (n 4) art 2(b).

<sup>44</sup> Warships and ships owned or operated by States for non-commercial governmental service are exempted from an arrest or other similar measure capable of leading to a judicial sale. Such exemptions are accepted worldwide as part of State immunity principles. Thus, the definition of 'ship' in art 2(b) of the Beijing Convention, in effect, already excludes those ships. See the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels (adopted 10 April 1926, entered into force 8 January 1936) and Additional Protocol, signed at Brussels (adopted 24 May 1934, entered into force 8 January 1936) 176 LNTS 199, art 3.

<sup>45</sup> For example, in some States, illegal fishing may lead to a confiscation and then forced sale of the ship committing the crime, or smuggling may cause the forfeiture and auction of the ship involved. National laws in this respect can be found in 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' in CMI, *Year Book 2010* (CMI Headquarters 2010).

<sup>46</sup> Beijing Convention (n 4) art 2(a)(1). It is noteworthy that in common law jurisdictions, a sale may be petitioned by any party at any stage in an action *in rem*; see L Tec, 'Judicial Sale of Vessels in Asia-Pacific Common Law Jurisdiction' in CMI, *Yearbook 2013* (CMI Headquarters 2013).

<sup>47</sup> 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 C Hill, *Maritime Law* (6th edn, Informa Law from Routledge) 39–40.



sale by a port authority under a statutory power, such as that provided in English law, is also not covered.<sup>48</sup> Second, the sale must be carried out via a public auction or a private sale under the supervision of a court.<sup>49</sup> This requirement is in line with the *modus operandi* of most judicial sales in national law. In many States, a court-approved private sale is viable, either as an alternative to<sup>50</sup> or following the failure of public auctions.<sup>51</sup>

Finally, for the Convention to apply, the judicial sale has to purge all pre-existing charges on the ship and transfer a clean title free from encumbrances to the purchaser.<sup>52</sup> This requirement has been criticised for giving rise to a logical circularity, ie, the purpose of the Convention is to ensure recognition of a foreign judicial sale, but one frequently asserted reason for opposing a foreign judicial sale is that the foreign sale has not vested in the purchaser a clean title in the legal system of the State that carried out that sale, and if there is indeed no clean title, the Convention is inapplicable.<sup>53</sup> However, this concern seems overstated. Creditors cannot subsequently contest the clean title conferred by the judicial sale, given their entitlement to participate in the sale proceeding and be paid with the proceeds stems from the validity of the title conferred under the national law of that State.<sup>54</sup> In other words, creditors cannot try to deny the outcome of this type of judicial sale once it is finalised, because *res judicata* applies. As indicated above when the scope of the Judgments Convention was discussed, examples of judgments on the merits can be found in enforcement proceedings and this is one such example.<sup>55</sup>

Whether or not the judicial sale of ships confers a clean title to the purchaser is determined by the national law of the State party to the Convention where the ship is

<sup>48</sup> *The Queen of the South* [1968] P 449. See also N Meeson and J Kimbell, *Admiralty Jurisdiction and Practice* (5th edn, Informa Law from Routledge 2017) para 6.14.

<sup>49</sup> Beijing Convention (n 4) art 2(a)(i).

<sup>50</sup> 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) art 268. Such sales can also be found in Maltese and English laws, although the procedures in these jurisdictions differ.

<sup>51</sup> In China, 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 per cent of the appraised price. 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), arts 12–14.

<sup>52</sup> Beijing Convention (n 4) arts 1, 2(c).

<sup>53</sup> P Myburgh, 'International Recognition of Judicial Ship Sales: English Common Law and the Beijing Convention' (2022) 28(6) *JIML* 410.

<sup>54</sup> As a comparative inquiry demonstrates, jurisdictions rooted in varying legal traditions share the view that once concluded, the sale becomes final and not subject to appeal. In English law, a judicial sale is usually concluded by a public tendering process termed a 'private treaty'. The tenders will be opened when the deadline expires and the highest bid will be accepted. Upon adequate payment on schedule, the sale becomes final. In the Netherlands, a judicial sale proceeds via a public hearing. After the successful bidder pays the price, the court or notary will issue an order declaring the transfer of property to the purchaser. Once adjudicated, the sale is final. In both States, creditors can intervene in the sale before its conclusion as well as register their claims in the competent court for the purpose of participating in the distribution. Nevertheless, the payment of debts does not affect the transfer of title as the principal result of a sale. Similar rules can also be found in Chinese and Maltese laws. See YF Shao, LC Pineiro and MQ Mejia Jr, 'Paving the Way to Recognising Foreign Judicial Sales of Ships: A Comparative Analysis of Judicial Sale Proceedings in Selected Jurisdictions' (2023) 15(1) *Cuadernos de Derecho Transnacional* 136.

<sup>55</sup> See nn 25–26 and their accompanying text.



physically situated at the time of the sale.<sup>56</sup> This territorial requirement fits with the generally accepted jurisdiction rule concerning judicial sales whereby States can assert jurisdiction over ships situated within their territories.<sup>57</sup> In addition to this territorial requirement, the Convention only governs judicial sales that are ordered after it enters into force in the State where they take place.<sup>58</sup>

### B. Rules Governing the Judicial Sale Proceedings

The Beijing Convention in Articles 4 and 6 pays particular attention to two critical elements of the judicial sale of ships: (i) notification and publication of sale notice, with a view to ensuring fairness to creditors; and (ii) that creditors' interests are secured given that the sale proceedings will result in a final sale with clean title. This is because it is critical that creditors are notified or otherwise learn about the open proceedings to decide whether to participate or not and defend their interests against the enforcing creditor, given that opportunity for them to pursue a claim is subsequently removed. It is also important that the sale notice is distributed as widely as possible to attract potential purchasers and thus obtain the best possible sale price, increasing proceeds and the chances for debt recovery. Any other procedural matters are subject to the law of the State where the sale occurs (*lex fori processus*),<sup>59</sup> but the Convention reinforces the philosophy of protecting creditors other than the enforcer by requiring the *lex fori processus* to have a procedure for challenging judicial sales before their completion.<sup>60</sup>

Article 4 of the Beijing Convention contemplates the following aspects of the notification process: (i) the means of identification of the persons entitled to notice (para 7); (ii) who is entitled to notice (para 3); (iii) the content of notice (para 4); and (iv) the methods by which interested parties should be notified (para 4).

First, although the matter of identifying the relevant persons to be notified is subject to the *lex fori processus*, the Convention says that it is sufficient for the authority selling the ship to rely on the register or information filed to the court by the maritime lienec.<sup>61</sup> Thus even if the authority cannot reach certain parties using the recorded contact information, it could be deemed that the sale notice has been given validly.

<sup>56</sup> Beijing Convention (n 4) art 3(1).

<sup>57</sup> As specifically indicated by the Beijing Convention *ibid*, art 5(1). See Shao, Pineiro and Mejia Jr (n 54). International law has similar rules to national laws on this. In the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, art 28 states that a coastal State has jurisdiction when a foreign ship, of a nationality other than that of the coastal State, is in its territorial waters.

<sup>58</sup> Beijing Convention (n 4) art 21(3). The Convention will enter into force in the relevant State 180 days after the date when an instrument of ratification, acceptance, approval or accession is deposited, as indicated in art 21(2) thereof.

<sup>59</sup> 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 R Heward, 'England and Wales Part III. Judicial Sales of Vessels and Priority of Claims' in Breitzke and Lux (n 8) 13; Dutch law, Dutch CPP, arts 570(2), 575(6); Chinese law, Chinese Special Maritime Procedure Law (Chinese SMPL) arts 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, arts 20, 26.

<sup>60</sup> Beijing Convention (n 4) art 4(1).

<sup>61</sup> *ibid*, art 4(7).

Second, the Convention does not prevent State parties from notifying any relevant creditor in accordance with their own legal requirements, but it does stipulate a list of persons to be informed of a coming sale, with a view to ensuring that no creditor is left behind. Five categories of potential interested parties are identified in Article 4(3). First, the ship registry must be notified,<sup>62</sup> so it may prepare for the forthcoming record change as well as give notice to registered creditors in accordance with its national law. Second, the holders of any mortgage or registered charge must be informed,<sup>63</sup> provided the register is open to public inspection<sup>64</sup> and the extracts and copies of instruments are obtainable.<sup>65</sup> Third, maritime lien holders, whose privilege ranks before mortgagees' and shall thus be given commensurate protection, must be notified.<sup>66</sup> Maritime lienees are obliged to make themselves known to the sale authority according to the procedures and regulations in national laws, such as intervening in the action where the sale is ordered or filing a caveat against the ship's release.<sup>67</sup> Fourth, the shipowner affected by the sale should be given a notice.<sup>68</sup> The term shipowner is defined based on the fact of registration and thus the Convention does not take into account the beneficial owner. Fifth, bareboat charterers and bareboat charter registries must be informed<sup>69</sup> in light of the ubiquitousness of bareboat charters in maritime trade.

Third, in terms of the content of the notice, Article 4(4) states that the notice should contain as a minimum the information listed in Annex I to the Beijing Convention. Annex I lists 14 particulars including the conducting authority, time, place, and potential effects of the sale, with number 14 requiring the inclusion of any other information necessary to enable relevant parties to make themselves heard and thus protect their interests in the sale proceeding.

Fourth, Article 4(4) also states that notice should be given in accordance with the law of the State of judicial sale. This would thus include the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Convention)<sup>70</sup> where the sale State is a party to it. Article 13(2) of the Beijing Convention acknowledges the potential application of the Service Convention but notes that methods other than those provided for in the Service Convention can be adopted. Similarly, the Service Convention does not exclude the use of notification methods other than those provided in its text.<sup>71</sup> This allows for the use of new

<sup>62</sup> *ibid.*, art 4(3)(a).

<sup>63</sup> *ibid.*, art 4(3)(b).

<sup>64</sup> UNCITRAL suggests that a fee for an extract or requiring the applicant to demonstrate its identity does not frustrate the availability of public access. See UNCITRAL, 'Draft Explanatory Note on the Convention on the International Effects of Judicial Sales of Ships – Part II' (12 May 2022) UN Doc A/CN.9/1110/Add.1 (Explanatory Note – Part II) para 14.

<sup>65</sup> Beijing Convention (n 4) art 4(3)(b). The preconditions concerning public access and the obtainability of extracts are in line with art 1 of the MLM Convention 1993 (n 16), which sets forth the conditions for a mortgage, *hypothèque* or registered charge to be recognised and enforceable under that Convention.

<sup>66</sup> Beijing Convention *ibid.*, art 4(3)(c).

<sup>67</sup> For a discussion on the caveat against release, see Meeson and Kimbell (n 48) paras 4.93–4.96.

<sup>68</sup> Beijing Convention (n 4) art 4(3)(d).

<sup>69</sup> *ibid.*, art 4(3)(e).

<sup>70</sup> Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (adopted 15 November 1965, entered into force 10 February 1969) 658 UNTS 163 (Service Convention). For details of this Convention, see The Hague Conference on Private International Law (HCCH), *Practical Handbook on the Operation of the Service Convention* (HCCH 2016) 13.

<sup>71</sup> Service Convention *ibid.*, art 25: 'Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the contracting States are, or shall become, Parties'.

methods of notification, such as those based on new technologies with the potential to speed up the process of notification and ensure proof of service.

The rationale behind this broad provision in relation to notice methods may be the plethora of service methods in national laws. English law provides a good illustration.<sup>72</sup> When service is to be effected on a party out of jurisdiction, the document may be served through: (i) foreign governments or British consular authorities; (ii) any method allowed in a treaty by which the UK is bound; or (iii) a method permitted by the law of the destination State.<sup>73</sup> Moreover, service out of England may be avoided by service in England, ie subject to certain requirements, parties overseas may be served through their agent in England, thus lessening the procedural rigour.<sup>74</sup> This may be done by any method authorised by the court or contractually agreed, including via electronic means.<sup>75</sup>

Remarkably, as a general principle, common law jurisdictions consider ship arrest to be constructive notice to the world, thus rendering creditors responsible for keeping themselves informed of what happened to the ship,<sup>76</sup> except for those having filed a caution against the ship's release or the proceeds of sale.<sup>77</sup> Under the Beijing Convention, the authority conducting the judicial sale is bound to notify registered owners, holders of a mortgage or other charge, and the registry of a forthcoming sale, none of which are entitled to notice in English law. Should this notification method be considered compatible with those accepted by the Beijing Convention? Although the notification method is subject to the *lex fori processus*, a purposive interpretation seems to suggest otherwise. Should constructive notice be accepted, seeking a balance between a sale's expediency and its fairness by directly informing chosen groups of creditors would be meaningless, and a vital precondition for giving international effect to the sale would also be thwarted. During the negotiations for the Convention, UNCITRAL always considered notice as being given personally, instead of constructively.<sup>78</sup> Were such constructive notice to be relied upon, the seized courts would be prevented from issuing a Certificate of Judicial Sale attesting that the proceedings complied with the Convention. States accustomed to the ease of constructive notice will thus have to weigh it against the benefits of smooth recognition of clean titles abroad when deciding whether to ratify the Convention.

In addition to notification, the Convention requires a sale to be publicised, not only to ensure that as many creditors as possible are aware of the sale proceedings, but primarily to seek the participation of as many bidders as possible in the public auction.<sup>79</sup> To this end, the sale notice is to be published in the press or in other broadcasting media accessible in the State of the judicial sale.<sup>80</sup> Given the international nature of the sale, the drafters of the Beijing Convention devised an innovative low-cost solution for publishing the sale notice abroad, ie publishing it in a repository under the supervision of the Secretary General of the International Maritime Organization (IMO), as a module of the Global Integrated Shipping Information System (GISIS), a well-established

<sup>72</sup> English law refers to the law of England and Wales.

<sup>73</sup> Civil Procedure Rules 1998, SI 1998/3132 – Rules and Directions, Section IV (service out of the jurisdiction) r 6.40. <sup>74</sup> *ibid*, r 6.16. <sup>75</sup> *ibid*, r 6.2.

<sup>76</sup> W Tetley and RC Wilkins, *Maritime Liens and Claims* (International Shipping Publications 1998) 1103. <sup>77</sup> Civil Procedure Rules 1998 – Rules and Directions (n 73) section 61, r 9.1.

<sup>78</sup> Explanatory Note – Part II (n 64) para 25. <sup>79</sup> Beijing Convention (n 4) art 4(5)(a).

<sup>80</sup> For instance, an online publication or a paper publication circulated worldwide.

information platform developed by the IMO to provide unlimited public access to the data collected by the IMO secretariat and stored in off-line databases.<sup>81</sup> UNCITRAL may appoint another institution to run the repository, but the IMO remains the best choice for obvious reasons.

Regardless of the institution in charge, the repository should be accessible to the public in general.<sup>82</sup> Publication in this repository follows the rules established by the institution running it and by the State of judicial sale, but the Beijing Convention adds the requirement that it is done in a timely manner and in the form and language in which it is received.<sup>83</sup> In other words, the repository is not obliged to supervise the accuracy of the sale notices, but only to publish them as submitted and in a timely manner. If the sale notice is not issued in a working language of the repository,<sup>84</sup> the minimum information as set out in Annex I must be translated before the sale notice is transmitted to it.<sup>85</sup>

Indeed, the Beijing Convention leans considerably on the visibility of GISIS among stakeholders in the maritime industry for enhancing the transparency of judicial sales.<sup>86</sup> Other than the notice of sale, GISIS will also publish the Certificate of Judicial Sale and any decision that nullifies or suspends the effects of a judicial sale for which a certificate has been issued.<sup>87</sup> It remains to be seen whether this reliance on GISIS will be beneficial, as it is heavily dependent on commercial interests being able to monitor easily the status of judicial sales from the new GISIS module.<sup>88</sup>

### C. International Effects of Judicial Sales Covered by the Beijing Convention

#### 1. Preparing the judicial sale to be recognised abroad: the Certificate of Judicial Sale

Once a judicial sale is finalised, having been done in accordance with the requirements in the Beijing Convention discussed above and in accordance with national law, the purchaser acquires ownership and thus a title to the ship. However, this title needs to be recognised abroad. In order to facilitate the process, the Beijing Convention resorts to a technique well known in international circles of standardising the formalities for ownership. The Certificate of Judicial Sale is thus issued to the purchaser by the public authority designated by the State of judicial sale according to its law,<sup>89</sup>

<sup>81</sup> One of the main goals of the IMO is to ensure the consistent and effective implementation of IMO instruments and compliance with their requirements. GISIS, developed by making use of technology, allows direct reporting by Member States in compliance with existing requirements and access to data compiled by the IMO secretariat. As of July 2024, GISIS had 29 modules. See IMO, 'Global Integrated Shipping Information System' <<https://gisis.imo.org/Public/Default.aspx>>.

<sup>82</sup> Beijing Convention (n 4) art 4(5)(b). <sup>83</sup> *ibid*, art 11(2). <sup>84</sup> During the preparation of the Convention, the working languages of the repository were English, French and Spanish. <sup>85</sup> Beijing Convention (n 4) art 4(6).

<sup>86</sup> UNCITRAL, 'Report of Working Group VI (Judicial Sale of Ships) on the Work of its Thirty-Seventh Session (Vienna, 14–18 December 2020)' (29 December 2020) UN Doc A/CN.9/1047/Rev.1, paras 76–78.

<sup>87</sup> Beijing Convention (n 4) art 5(3), 11(2). The latter two documents will be discussed below. <sup>88</sup> R Thomas, 'The United Nations Convention on the International Effects of Judicial Sales of Ships: The Beijing Convention – A Textual Analysis' (2022) 28(6) JIML 367, 379.

<sup>89</sup> Thus, issues such as whether a certificate can be issued *ex officio*, whether the certificate must be served, whether multiple certificates can be issued, the period of validity of certificates, and who can apply for certificates are all subject to the *lex fori processus*. Explanatory Note – Part II (n 64) para 45.

provided that there has been: (i) completion of a sale, (ii) that confers on the purchaser a clean title to the ship, (iii) carried out in accordance with the law of the State where the sale occurred, and (iv) in compliance with the procedural requirements in the Convention.<sup>90</sup>

This document operates as prima facie evidence of the judicial sale having been concluded in compliance with all due process requirements embedded in the Beijing Convention. As indicated by Article 5(5) of the Beijing Convention, ‘Without prejudice to articles 9 and 10, the certificate of judicial sale shall be sufficient evidence of the matters contained therein’, meaning that authorities in other States are expected to recognise the international effects of the judicial sale without further examination of the transfer of property evidenced by the Certificate of Judicial Sale. To this end, the Beijing Convention reinforces the evidentiary value of this Certificate by allocating the responsibility for ensuring all interested parties’ rights to the courts and public authorities of the State of judicial sale. In addition to having jurisdiction to conduct the sale proceeding and issue the relevant Certificate, they are responsible for any claim or application for avoidance of, or challenge against, the judicial sale.<sup>91</sup> Further, this exclusive jurisdiction is cemented by the Convention requiring that the courts of other party States decline to hear such claims.<sup>92</sup> It is thus clear that neither the procedure nor the merits of a judicial sale of ships can be discussed anywhere other than in the State where the ship is physically located at the time of the sale, except for public policy reasons as enshrined in the State of recognition. Further strengthening this idea, the Beijing Convention provides for actions to be undertaken by the ship registry, courts or other authorities in the recognition State that are in line with the principle that the judicial sale of a ship cannot be challenged outside the jurisdiction where it has taken place.

Placing the responsibility on the State where the judicial sale takes place and curtailing that of others is critical to avoid cases such as that of the *MV Bright Star* mentioned above. Should Jamaica and Malta become parties to the Beijing Convention, Maltese mortgagees would only be able to bring their claims before the Jamaican courts as the ones with jurisdiction to conduct the judicial sale of the relevant ship. The ship’s purchaser would be entitled to seek recognition of the international effects of the Jamaican sale before the Maltese ship register or courts by handing down a Certificate of Judicial Sale issued by the relevant Jamaican authorities attesting that the judicial sale had been conducted according to the Jamaican and Beijing Convention rules. Since the Maltese authorities would be required to recognise the Jamaican judicial sale automatically unless Maltese public policy was patently infringed, Maltese mortgagees would only have the option in Malta of challenging the Jamaican sale on public policy grounds. A petition for ship arrest in Malta would be refused immediately. A claim requesting the nullity of the sale or otherwise challenging it could, however, be made before the Jamaican authorities.

Considering the increasingly ingrained practice of issuing certificates for cross-border legal issues,<sup>93</sup> the Convention provides a model form for the Certificate of Judicial Sale

<sup>90</sup> Beijing Convention (n 4) art 5(1).

<sup>91</sup> *ibid*, art 9(1).

<sup>92</sup> *ibid*, art 9(2).

<sup>93</sup> Magnus and Mankowski (n 35) 827. A model form may increase the standardisation and acceptance of certificates produced abroad.

in Annex II, which should be substantially followed.<sup>94</sup> Thus the State competent to issue the Certificate can use any language to fill in the form or have its own design for the Certificate, as long as the matters contained in the standardised form are incorporated. Corresponding to the model form's layout, those matters are also enumerated in Article 5(2), and include, among others, the sale's effects and the ship's particulars.<sup>95</sup>

A certificate can be issued electronically, in paper form, or both, according to the *lex fori processus*. With respect to the electronic form, Article 5(6) of the Beijing Convention sets forth three prerequisites concerning,<sup>96</sup> respectively: (i) accessibility, which means that information contained is accessible for subsequent reference;<sup>97</sup> (ii) authenticity, which requires the use of a reliable method to identify the issuance authority;<sup>98</sup> and (iii) integrity, which guarantees that any alteration to the record after the time it was generated can be detected.<sup>99</sup>

The Convention governs the authenticity of the Certificate. A signature or stamp of the authority issuing the Certificate or other confirmation of the Certificate's authenticity must be included in the Certificate.<sup>100</sup> In keeping with this requirement, a certificate and its translation<sup>101</sup> are exempted from legalisation<sup>102</sup> or similar formality.<sup>103</sup> Of particular importance is that the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention)<sup>104</sup> cannot apply.<sup>105</sup> The Apostille Convention only overrides provisions concerning legalisation in other treaties when those formalities are more rigorous than its own.<sup>106</sup> Thus, an avoidance of legalisation for certificates under the Beijing Convention is compatible with the Apostille Convention to the extent that the former establishes an inter-State cooperation framework based on the principle of trust, meaning that communication with the foreign issuance authority would be appropriate in case of inauthenticity,<sup>107</sup> both in the case of an electronic or paper certificate. However, it is important to recall that the inclusion of a Certificate of Judicial Sale in the repository does not require the

<sup>94</sup> Beijing Convention (n 4) art 5(2): 'The certificate of judicial sale shall be substantially in the form of the model contained in annex II'.  
<sup>95</sup> *ibid.*, arts 5(2)(a)–(k).

<sup>96</sup> Art 5 is modelled on the provisions in art 9 of the United Nations Convention on the Use of Electronic Communications in International Contracts (adopted 23 November 2005, entered into force 1 March 2013) 2898 UNTS 3. See Explanatory Note – Part II (n 64) para 66.

<sup>97</sup> Beijing Convention (n 4) art 5(6)(a).  
<sup>98</sup> *ibid.*, art 5(6)(b).  
<sup>99</sup> *ibid.*, art 5(6)(c).

<sup>100</sup> *ibid.*, art 5(2)(k).

<sup>101</sup> The recognising State can require a certificated translation of the certificate, for the purposes of registration changes and prohibition of arrest: Beijing Convention (n 4) arts 7(3), 8(3).

<sup>102</sup> 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.

<sup>103</sup> Beijing Convention (n 4) art 5(4).

<sup>104</sup> Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (adopted 5 October 1961, entered into force 24 January 1965) 527 UNTS 189 (Apostille Convention).

<sup>105</sup> Whether to avoid apostilles was the subject of heated debate in drafting the Convention. Art 20 of the sixth revision of the Draft Convention gave a State party the option to apply the Apostille Convention for the certificate of judicial sale. After deliberation, broad support was expressed for deleting art 20, because parties to the Apostille Convention would be subject to more onerous formalities than those who were not. Art 20 was thus deleted from the final text. The sixth revision can be found in UNCITRAL, 'Draft Convention on the International Effects of Judicial Sales of Ships' (4 March 2022) UN Doc A/CN.9/1108.

<sup>106</sup> Apostille Convention (n 104) art 8.

<sup>107</sup> Beijing Convention (n 4) art 12.

IMO or any other institution designated by UNCITRAL to manage this, or to examine their authenticity, including in those cases where the judicial sale of a ship has been considered void or challenged in the sale State. For these cases, the Beijing Convention has taken the precaution of requiring that the relevant judgment is also included in the repository in order to override a previous Certificate of Judicial Sale.<sup>108</sup>

## 2. *Recognising the international effects of judicial sales abroad*

The circulation of a purchaser's title among party States to the Beijing Convention takes place via a simple procedure based on the principle of automatic recognition facilitated by the Certificate of Judicial Sale. This simplicity is reinforced by linking this *prima facie* evidence with actions to be undertaken by key stakeholders, ie ship registries and courts in the relevant foreign State. They are expected to examine the Certificate of Judicial Sale formally and, if authentic, to recognise the transfer of the ship's ownership without further proceeding or examination.

Accordingly the Registry or other competent authority can take four non-cumulative actions upon production of an authentic Certificate of Judicial Sale: (i) deleting mortgages and charges registered before completion of the judicial sale;<sup>109</sup> (ii) deleting the ship from the register and issuing a deletion certificate;<sup>110</sup> (iii) re-registering the ship in the name of the purchaser or subsequent purchaser;<sup>111</sup> and (iv) updating the register with the particulars in the Certificate of Judicial Sale.<sup>112</sup> In addition, the bareboat charter registry may also delete its registration.<sup>113</sup>

Other authorities are also obliged to recognise the Certificate, including courts faced with an application for ship arrest requested by creditors whose claims have already been covered and cleaned up by the judicial sale to be recognised.<sup>114</sup> Two scenarios are envisaged: upon production of the Certificate, a ship arrested for a claim arising prior to the attested sale must be released,<sup>115</sup> or a petition for arrest based on such a claim is to be dismissed.<sup>116</sup>

These provisions concerning the actions to be taken by a foreign public authority upon being presented with a Certificate of Judicial Sale offer auxiliary protection to purchasers, who, as indicated by case law from different States, may encounter problems in practice, such as closing the ship's registration,<sup>117</sup> or dealing with wrongful interference by previous creditors.<sup>118</sup> The predictability and certainty brought by these uniform rules will aid the continuation of interrupted maritime trade.

All this does not preclude the automatic recognition of a judicial sale from being challenged, but only for infringement of the recognising State's public policy.<sup>119</sup>

<sup>108</sup> *ibid*, art 9(3).    <sup>109</sup> *ibid*, art 7(1)(a).    <sup>110</sup> *ibid*, art 7(1)(b).    <sup>111</sup> *ibid*, art 7(1)(c).

<sup>112</sup> *ibid*, art 7(1)(d).    <sup>113</sup> *ibid*, art 7(2).

<sup>114</sup> For a discussion on maritime interim measures, see W Tetley, 'Arrest, Attachment, and Related Maritime Law Procedures' (1999) 73 *TullRev* 1895.

<sup>115</sup> Beijing Convention (n 4) art 8(2).    <sup>116</sup> *ibid*, art 8(1).

<sup>117</sup> *The Norsland* (1972) Carswell Nat 18, FC 430. In this Canadian case, Panama refused to deregister a Panamanian-flagged ship sold by a Canadian court as free of encumbrances, unless the new purchaser paid out tax arrears. Consequently, the successful bidder paid the required sum to close the ship registration. That bidder then petitioned before the Canadian court for a subrogation of rights in its favour of the money paid and thus participation in the distribution of proceeds. The petition was allowed by the Canadian court.

<sup>118</sup> For example, the Maltese case involving the vessel *MV Bright Star* (n 19).

<sup>119</sup> Beijing Convention (n 4) art 10.



Other challenges can only be brought before the State of judicial sale as indicated above, thus precluding a reopening of the discussion on the merits that led to a clean title. Admittedly, public policy is an open concept which could undermine the Beijing Convention's objective of securing recognition. Thus, the strict application of this 'unruly horse'<sup>120</sup> is ensured, first, by requiring a high threshold for public policy to be invoked, ie only when there is a 'manifest' contradiction between the foreign sale and the fundamental values in the recognising State.<sup>121</sup> Second, UNCITRAL gives examples of public policy challenges in its Guidance to the Beijing Convention: the procurement of a sale by fraud committed by the purchaser, egregious procedural improprieties, and the infringement of sovereignty.<sup>122</sup>

More specific examples can be found in existing case law. For instance, in English law, collusion with the court and an insufficient sale price may be enough to amount to non-recognition grounded in natural justice. Similarly, in Dutch law, lack of proper notice as well as fraud may be sufficient to deny a foreign judicial sale. In *Atlantic Ship Supply v M/V Lucy*<sup>123</sup> in the United States, a mortgagee argued that natural justice was breached for lack of notice to that mortgagee.<sup>124</sup> The court did not support that claim, holding that no natural justice was breached since the law of the sale State did not require a notice to be sent. A Dutch court would examine the issue differently, focusing on whether the relevant parties were actually informed of the proceeding and thus could make a submission.<sup>125</sup> Nevertheless, it should be noticed that the provisions of the Beijing Convention have been drafted in such a manner to remedy these public policy issues by including uniform notification and publication rules that aim at, first, ensuring creditors' rights, and second, a fair sale price. They are also meant to preclude resort to the public policy exception to the automatic recognition of the international effects of the judicial sale abroad, to the extent that discussions on whether sufficient notice has been given are to be challenged before the courts which have conducted the judicial sale.

#### IV. CONCLUSION

The Beijing Convention tackles a vital issue in maritime litigation—the finality of judicial sales of ships. Without finality, judicial sales cannot properly fulfil their function as a method for realising rights on a ship, to the detriment of various commercial interests. A history of cases in several States<sup>126</sup> demonstrates that at present judicial sales of ships can be denied recognition unreasonably with serious repercussions for the maritime sector. The Beijing Convention aims to remedy this lack of legal certainty by establishing a coordinating mechanism among the States party to it to facilitate the cross-border circulation of a clean title obtained via judicial

<sup>120</sup> *Richardson v Mellish* (1824) 2 Bing 229; 130 ER 294, 303.

<sup>121</sup> Beijing Convention (n 4) art 10.

<sup>122</sup> Explanatory Note – Part III (n 42) para 36.

<sup>123</sup> *Atlantic Ship Supply v M/V Lucy* (1975) 392 F. Supp. 179 (US, MD Fla).

<sup>124</sup> Natural justice refers to legal principles common to almost all nations. It may be breached by substantial procedural irregularities, ie procedural public policy. See Lord Collins of Mapesbury, CGJ Morse and D McClean (eds), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) paras 14-163–14-165.

<sup>125</sup> H Smit, 'International Res Judicata in the Netherlands: A Comparative Analysis' (1966) 16 *BuffLRev* 165, 192–3.

<sup>126</sup> See the list of cases that was submitted to the Malta Colloquium under the auspices of the CMI in 2018 (n 9).

sale. There are obvious advantages to such coordination: (i) it enhances the transparency and integrity of judicial sales of ships by the harmonisation of notice rules and the recourse to an online repository with global outreach; (ii) it clarifies the matters concerning the arrest of ships on the basis of claims supposedly extinguished by the sale and the changes in the relevant registries, providing auxiliary protection to purchasers; on the basis of which, (iii) it will result in automatic recognition abroad, which can only be denied in case of public policy infringement.

Like other treaties, the Beijing Convention is not flawless. Uncertainties may arise about its scope of application as well as its interaction with the Judgments Convention. The provisions in Article 1 concerning applicability have been criticised as tautological. Should the Convention only apply to the recognition of a judicial sale that has conferred a clean title, would the seized authority be obliged to examine a sale's merits in accordance with its national law, for the Convention to be applied to grant recognition? In that case, the Convention would be meaningless. An inquiry into the national practice of judicial sales suggests otherwise, but this concern, at least, justifies consideration of the structure and wording of the Convention. In addition, where both the Beijing Convention and Judgments Convention are applicable, the regime more favourable to the purchaser shall apply, which will be the former with its automatic recognition provisions. This enquiry is only necessary where both treaties are applicable. If only the Beijing Convention applies, no question of the applicability of the Judgments Convention arises, but where only the latter is in force, States will need to decide if they can apply it to judicial sales given the view expressed by UNCITRAL that it does not, and may thus need to debate whether judgments rendered in sale proceedings are also judgments on the merits to establish whether it can be applied.

Whilst the benefits are obvious, the main obstacle to the success of the Beijing Convention is also obvious—it relies on its ratification by States. Should the Convention be widely ratified, it would encourage other States to ratify to benefit from the free circulation of clean titles conferred in their jurisdiction, while strengthening their appeal as reliable legal venues capable of reducing transaction costs. Strangely, the Convention only requires three ratifications for entry into force which is problematic while establishing a cooperation framework. However, 27 States have already signed, including China, Singapore and Switzerland who have championed the Convention since its very beginning.<sup>127</sup> Liberia, the world's second biggest flag State, has also signed,<sup>128</sup> as has the European Union (EU),<sup>129</sup> which will

<sup>127</sup> These three States have participated in the deliberation of the Beijing Convention since the CMI work in 2008 and been highly supportive of such an international convention to facilitate the free circulation of titles conferred by judicial sales. For example, China held a signing ceremony on 5 September 2023 (n 5). Singapore welcomed the harmonised regime for giving international effect to judicial ship sales; see 'Statements by Mr Scott Tan, Delegate to the 78th Session on the United Nations General Assembly, On Agenda Item 77' (16 October 2023) para 3. Switzerland proposed to UNCITRAL to include the Beijing Convention in its work on 22 June 2018; see UNCITRAL, 'Possible Future Work on Cross-Border Issues related to the Judicial Sale of Ships: Proposal from the Government of Switzerland' (22 June 2018) UN Doc A/CN.9/944/Rev.1.

<sup>128</sup> UN Conference on Trade and Development (UNCTAD), 'Review of Maritime Transport 2022: Navigating Stormy Waters' (2022) 44 <<https://digitallibrary.un.org/record/3995932>>.

<sup>129</sup> Judicial cooperation in civil and commercial matters is within the EU's competence, so it can sign and ratify the Beijing Convention. That said, only recognition of foreign judgments and service of documents abroad fall within the scope of the EU's exclusive external competence, so the Member States must also ratify the Convention in order for it to take full effect in their

entail ratification by all 27 EU Member States. Full ratification will establish the EU as an area of smooth circulation of clean titles and will serve as an incentive to conduct judicial sales within it, and encourage other States to ratify the Convention.

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jurisdictions. See Council Decision (EU) 2024/414 of 21 December 2023 on the signing, on behalf of the European Union, of the United Nations Convention on the International Effects of Judicial Sales of Ships, adopted by the United Nations General Assembly in New York on 7 December 2022 [2024] OJ L, 29.1.2024, 3.