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Judicial Sales of Ships

A Comparative Study

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Judicial Sales of Ships

A Comparative Study

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Hamburg Dr. Lief Bleyen
June 30, 2015

Abbreviations

All ER	The All England Law Reports
ALR	American Law Reports
App. Cas.	Law Reports, Appeal Cases
APR	Algemene Praktische Rechtsverzameling
AC	Law Reports Appeal Cases
Arr. Cass	Arresten Cassatie
Art.	Article
Arts.	Articles
BMC	Belgian Maritime Code
BCC	Belgian Civil Code
BCCP	Belgian Code of Civil Procedure
BCIPL	Belgian Code of International Private Law
BComm.C	Belgian Commercial Code
DComm.C	Dutch Commercial Code
BGBEG	Bürgerliches Gesetzbuch Einführungsgesetz
B.S.	Belgisch Staatsblad
Ch	Law Reports, Chancery Division
CMI	Comité Maritime International
CPR	Civil Procedure Rules
DMF	Droit Maritime Français
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Reports
ER	English Reports
ETL	European Transport Law
ETS	European Treaty Series
EU	European Union
EWHC	England and Wales High Court

FCR	Federal Court Reports
fn.	Footnote
GMLA	German Maritime Law Association
H.&N.	Hurlstone & Norman's Exchequer Reports
HGB	Handelsgesetzbuch
HKEC	Hong Kong Electronic Cases
HKCFI	Hong Kong Court of First Instance
HR	Hoge Raad der Nederlanden
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICR	Industrial Cases Reports
ILM	International Legal Materials
ILR	International Law Reports
IPL	International Private Law
JHA	Jurisprudentie Haven van Antwerpen
KB	Koninklijk Besluit
KG	Kortgeding (tijdschrift)
LJQB	Law Journal Reports, Queen's Bench New Series
Lloyd's Rep.	Lloyd's Law Reports
Ll. L.Rep.	Lloyd's List Law Reports
LMLN	Lloyd's Maritime Law Newsletter
LNTS	League of Nations Treaty Series
LT	Law Times Reports
L.R.	Law Reports
L.R.H.L.	Law Reports, English and Irish Appeals
MCA	Merchant Shipping Act
NJ	Nederlandse Jurisprudentie
NMLA	National Maritime Law Association
NZLR	New Zealand Law Reports
OECD	Organisation for Economic Co-operation and Development
P.	Pacific Reporter
Pas.	Pasicrisie Belge
PD	Practice Directions
P.D.	Law Reports, Probate, Divorce and Admiralty Matters
S&S	Schip en Schade
SGHC	Singapore High Court
RHA	Rechtspraak van de haven van Antwerpen
SLR	Singapore Law Review
R.W.	Rechtskundig Weekblad
SA	South African Law Reports
SI	Statutory Instruments
Stb.	Staatsblad
Stcrt.	Staatscourant
TBH	Tijdschrift voor Belgisch Handelsrecht

TGR	Tijdschrift voor Gentse Rechtspraak
UKHL	United Kingdom House of Lords
UNTS	United Nations Treaty Series
US	United States
WLR	Weekly Law Reports
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie
W. Rob	William Robinson's Admiralty Reports
ZAWCHC	South Africa Western Cape High Court

Contents

Chapter 1
Introduction

In today's globalised world, maritime transport plays a dominant role in serving and developing international trade. More than 90 % of the globally traded goods are carried by sea, which makes the ship a highly essential asset without which modern global commerce would not have been conceivable. Merchant ships, ranging from container ships and tankers to bulk carriers and passenger vessels, are becoming increasingly sophisticated in order to meet the demands of the fast-paced world economy. Considering that ships are the most efficient and cost-friendly mode of transport, there is no doubt that shipping is essential for the world's economic and social development.[1]

Trade activities and shipping go hand in hand and both are susceptible to economic changes. Market cycles affect seaborne trade to a great extent, which makes shipping a highly volatile business.[2] At the time of writing, the shipping industry is sailing through rough economic waters and has difficulties in staying afloat in this period of distress. The financial crisis starting with the collapse of the banking sector resulted in a worldwide liquidity and solvency problem which eventually affected the world economy. This resulted in a crash of the equity market and a decrease of commerce and globally traded goods, negatively affecting the demand for seaborne trade. Besides this, the excess number of newbuildings i.e ships that were ordered during flourishing times prior to the crisis put the shipping industry under even more pressure. The over-supply of available ships in combination with the diminishing demand for shipping services caused an extreme and protracted collapse of freight rates resulting in the demise of numerous shipping companies.[3] Many companies have inevitably been left struggling to meet their

[1] M. Stopford, *Maritime Economics* [London, 2009] 89–90. See also M. Stopford, "How shipping has changed the world and the social impact of shipping", 7 September 2010, available at www.clarksons.net -> archive -> research (last visited at 08/08/2013.)

[2] M. Stopford, *Maritime Economics* [London, 2009] 93–133.

[3] A key indicator of the freight rates is the Baltic Index, which fell to its record low during the crisis. For more information see www.balticexchange.com.

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financial obligations, affecting their creditors such as the crew, lenders, bunker suppliers and insurers. Ship finance banks with large portfolios suffer in particular from defaulting debtors as they usually have the largest share in what is claimed. To a large extent, banks have secured their loans by having a mortgage on the ship and by taking an assignment of earnings and insurance covers. Although these various elements of guarantee provide the lender security against a defaulting creditor, this security might not be sufficient when ship values fall in times of distress or when no profits are made. Therefore, as soon as a default occurs, lenders usually react directly and take measures in order to mitigate their losses as much as possible. The ship-owner can, in agreement with its lenders or through a judicial process, reschedule his financial commitments and develop an acceptable restructuring plan for improving the recovery to creditors. Successfully restructuring the loan might prevent the owner from going into liquidation, increasing the chance for recovery. Considering that the value of the loan can in some circumstances exceed the value of the asset on the auction, other existing creditors are usually cooperative towards restructuring as well. When attempts of restructuring the defaulters' balance have failed,[4] creditors will often resort to provisional and protective measures and potentially enforce their security.[5]

The principal methods of enforcing the bank's security are through a private sale or a judicial sale,[6] which can be used in conjunction with an entry into possession of the ship. A private sale is often excluded when both the borrower and the other creditors[7] are not co-operative. Moreover, a private sale does not eliminate the claims resting on the ship, which constitutes a considerable disadvantage when the asset is heavily encumbered. If a private sale cannot be arranged or is not considered to be beneficial, and when the ship-owner cannot provide security for the existing creditors,[8] claimants and more specifically the ship financing bank will typically seek to arrest and judicially sell the ship in order to satisfy the existing claims. This method of enforcement has the advantage that it transfers a clean title over the ship to the purchaser. Moreover the whole procedure does not require the cooperation of the owner, in contrast to a private sale for example.[9] The judicial

[4] This can occur when, for example, one of the creditors ignores the existing restructuring agreement and arrests the vessel, causing significant losses that are not calculated into the restructuring process.

[5] For a treatise on all aspects of the arrest of ships, including a survey of the laws on arrest in various jurisdictions, see F. Berlingieri, *Berlingieri on Arrest of Ships* [London, 2011].

[6] The practice of combining the two methods, also known as the court-approved private sale, will be further explored in the comparative chapter.

[7] Creditors having maritime claims might want to protect their position and arrest the ship, making a private sale not possible.

[8] This can be a guarantee or a letter of undertaking from a P&I club, bank or other insurance company. A breach of such undertaking is a ground to take legal action for breach of contract.

[9] However, in order to be able to direct a ship to a certain jurisdiction, cooperation of at least the master of the ship is necessary, which is usually achieved by advance payment of expected crew

sale procedure, which is the subject of this research, is often a creditor's last and best remedy for satisfying his claim.

A. The Purpose

This comparative study aims in the first place at *identifying the differences* in the judicial sale procedure between various jurisdictions. In so doing it will identify those procedural elements that make a certain jurisdiction more attractive for creditors than others. This research will highlight those procedural peculiarities enforcing creditors should take into account when considering a judicial sale in a certain jurisdiction. Furthermore, this comparative study explores the possibility to *harmonise laws* on judicial sales of ships, with a special focus on the CMI Draft Instrument on judicial sales of ships. In the long run, this research has the aim of forming a basis for later *reform and improvement* of national laws on this topic. In fact, it is often by studying foreign law that one can find certain elements which might either solve difficulties in a domestic law or make the law more attractive and useful for its users.

B. The Content

In contrast to the laws on the arrest of ships, the laws on the judicial sale of ships have not gone through an extensive harmonisation process. This study will in its Chapter 2 analyse the handful of existing international and European laws on the sale procedure—or at least a certain phase of it—and assess their impact on the harmonisation of the judicial sale procedure as a whole.

Although certain aspects of the judicial sale procedure might have been internationally regulated, the tendency of claimants to search for a convenient *forum arresti* evidences the existing differences in laws between states. Some jurisdictions seem to have enacted more favourable laws than others, which often causes lenders to direct the financed ship to a 'friendly' jurisdiction or to wait until the ship calls at a port in such a jurisdiction. The mobility of the ship and the differences between jurisdictions causes litigants to actively engage in 'forum shopping' with the goal of obtaining a quick and adequate recovery of any invested money and at the same time creating a free and unencumbered title over the sold ship. Chapters 3–6 of this study aim at identifying these differences in the judicial sale procedure by comparing the domestic law of three different jurisdictions, leaving out the application of international or European instruments as already addressed in Chapter 2. All

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claims. Waiting until the ship calls at a port of a favorable jurisdiction might cost too much time, unless the ship is trading in that area.

sharing the same sea, Belgium, the Netherlands and England and Wales are particularly interesting as a basis for the comparative study. These three jurisdictions have a remarkable maritime history and feature large ports with considerable maritime traffic, which makes that ships routinely frequent their jurisdictional waters. Creditors are therefore more in quest of judicial sales in these states, certainly when crew members are not cooperating to direct the ship to a different jurisdiction. Moreover, the fact that all three states are subject to European regulations adds an interesting European perspective to the comparison. Also, the inclusion of both civil and common law approaches provides an additional dimension to the study. This research is however not limited to the three discussed states.[10] The comparison will in the first place serve as the basis to indicate certain differences, which will be further discussed in the comparative summary following the national reports. In this comparison, examples of other major shipping nations such as Germany[11] and Malta[12] are used. Furthermore, some overseas states have inherited, due to historical reasons, similar or identical laws and legal systems from the selected jurisdictions. The comparison made in Chapters 3–6 of this research will therefore also be of use for other popular judicial sale *fora* such as the Netherlands Antilles and most states that were part of the former British Empire.

As a first comparative element, each national report will discuss the sources of law that form the framework wherein a judicial sale takes place in the discussed state. The comparative parts will also briefly touch on the court system of the state in question and will discuss which entities play a role in the judicial sale procedure.

The conditions that have to be met before a judicial sale can be initiated constitute the second point of comparison. Notwithstanding the fact that usually the mortgagee bank is the enforcing party, the possibility for other claimants to initiate a sale procedure is explored as well.

Thirdly, each national report will discuss the required legal preparations for the judicial sale and will analyse how the conditions of sale are established, how the sale is organised and who assumes responsibility for bringing the entire procedure to a favourable conclusion.

How the actual judicial sale of both foreign and domestically registered ships is conducted comprises the fourth element of comparison. This section sheds light on the essential procedural elements, which might have a significant influence on the actual sale price at the auction.

The subsequently discussed element of comparison focusses on the post-sale phase of the judicial sale. This fifth chapter in the national reports takes a closer look into the distribution of the sale proceeds and the various consequences and legal effects of a domestic judicial sale on a foreign or domestically registered ship. The distribution of the proceeds of the sale will take place in accordance with a

[10] Certain aspects of the judicial sales of ships will also be discussed in regards to states such as Gibraltar, Malta, Germany and Singapore.

[11] Germany is, in particular, strong on the ship-financing side.

[12] Malta stands for a popular ship registry and judicial sale jurisdiction.

certain order of priority, on the basis of the domestic conflict-of-law rules applicable to the ranking of rights. Notwithstanding the fact that the judicial sale procedure itself is generally considered to be a procedural matter and thus largely subject to the *lex fori*, the classification of some aspects of the pay-out phase is not that clear-cut. More in particular, the question whether the recognition and ranking of foreign claims are classified as a procedural or substantive matter is frequently a basis for debate. On some occasions, the application of the *lex fori* to the determination of the priority of claims could result in a grave injustice towards claimants who acquired rights that, while existing under the law of a foreign state, do not exist in the recognising state. The dissertation will explore the position of the discussed jurisdictions on this matter and place it in a comparative perspective.

In the last stage, the national reports will take a closer look at the domestic recognition of foreign judicial sales and their effects. This topic is in particular interesting as the parties involved in a public sale, such as mortgagees and purchasers of ships, have encountered extensive problems in the past with the international recognition of the effects of a judicial sale of a ship. Some national registries refuse, in some occasions, to deregister ships after a sale occurred abroad, which can cause difficulties in having the asset registered elsewhere. Moreover, if the sale is not internationally recognised, the pre-sale claims against the ship continue to exist on paper, which could have dreadful implications for all the parties involved. Once a judicial sale is completed and the funds are divided among the creditors, the *lex executionis* will authorise the new owner to start trading with a 'free and clear' title over the ship. Nevertheless, under general international law, a sovereign state cannot compel another state to accept its rulings, reserving the authority to assign certain legal consequences of foreign judicial sale in principle to each individual state.[13] This might be an open door for actors such as dissatisfied pre-sale claimants or owners who try to contest the judicial sale in a foreign court or who refuse to give consent to having their registered rights removed from the ship registry. In all these cases, the issue of recognition of the foreign judicial sale will be raised in a court which will have to decide whether or not to recognise the validity and extend the effects of this foreign enforcement procedure to its proper domestic law. The last part of each national report will analyse to what extent the consequences of judicial sales carried out by foreign courts of a competent jurisdiction are recognised by each of the discussed jurisdictions. Does the existing national framework provide sufficient legal certainty or is the recognition of the effects of a foreign judicial sale procedure a matter of judicial discretion?

After the national reports, the comparative assessment will focus on the main differences between the discussed jurisdictions. The competitive environment between states together with the legal and procedural ambiguity of the domestic laws on certain aspects of judicial sales of ships will be underlined in this Chapter 6.

[13] For more about the implications of non-recognition: see infra Chapter 6.

The uncertainty with regard to the recognition of foreign judicial sales will be the basis for Chapter 7 of this study. In this chapter, the dissertation will focus on the Final Draft International Convention on Foreign Judicial Sales and their Recognition as produced by the CMI. The necessity and feasibility of such instrument together with the main concepts and elements are discussed using the comparative study as a foundation.

C. The Scope

The scope of this study is restricted to the judicial sales of ships: only sales that are conducted with the involvement of a court or in a court-related procedure are discussed. These sales typically take place without the approval of the owner of the ship and are initiated by a claimant with the goal of obtaining recovery of claims against the ship or ship-owner. Contrary to a private sale,[14] which is not discussed in this research, a judicial sale gives the purchaser a *clean title* over the ship as it transfers all existing claims against the proceeds of sale in accordance with the hierarchy enacted in domestic law. This research will not focus on sales that do not arise from civil claims, such as governmental actions[15] or sales that are conducted during the course of insolvency proceedings. The emphasis of this study lies with the judicial sales of *registered commercial seagoing* ships, leaving out the sale of inland navigation vessels, vessels under construction and state-owned non-commercially operated ships.[16] This research will, however, in its comparison following the national reports briefly deal with a commonly used alternative to the judicial sale, namely the *court-approved private sale*, also known as the 'fast track' procedure. This method has been introduced recently with the goal of creating a more efficient procedure to enforce claims on ships.

[14] If the ship is not encumbered with other debts and if the borrower is cooperative, the bank usually has the power under its mortgage contract to sell the vessel by private treaty to a buyer of its choice. In some jurisdictions, claimants can request the court, prior to the order for sale of an arrested ship, for its permission to sell the ship privately under its supervision. Although this method is rather uncommon, this type of sale can indeed succeed in having the ship released free of encumbrances. See on this point The APJ Shalin [1991] 2 *Lloyd's Rep*. 62.

[15] For example, under Belgian law, the government is allowed to sell a ship if the ship that has caused damage to the relevant Belgian authority has been abandoned. See Wet 11 April 1998 houdende de goedkeuring en uitvoering van diverse internationale akten inzake de zeevaart, *B.S.*, 6 oktober 1989, art. 12–18.

[16] This is in line with the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels, 10 April 1926, 176 *LNTS* 1937, p 199 (hereinafter 1926 Immunity Convention) and its additional Protocol, signed at Brussels, 24 May 1934, 176 *LNTS* 1937, p 215. (hereinafter 1934 Immunity Protocol) This Convention and its Protocol do not allow the seizure, arrest, detention and commencement of any proceedings *in rem* against state-owned non-commercially operated ships.

As regards the scope of this study, it is important to note that many civil law jurisdictions make a distinction between arrests as a provisional measure and *arrests to enforce* a judgment. The first type of arrest, the conservatory arrest, will be left out of the scope of the dissertation. However, it is not unimportant to mention that the efficiency and reliability of the conservatory arrest procedure, although largely regulated by the 1952 Arrest Convention, can also play a role in the degree of favourableness of a certain *forum* for initiating a judicial sale procedure. Considering that an enforceable title is often not at hand on the occasion of an urgent default situation, the conservatory arrest procedure—and not the executory arrest—is in fact the first step in a judicial sale. An efficient conservatory arrest procedure therefore affects the popularity of a *forum* for initiating a judicial sale process. Although the arrest of the ship is a prerequisite for opening a judicial sale procedure, only the *executory arrest* procedure will be discussed in so far as it is necessary in the light of analysing the judicial sale procedure. In the discussed civil law jurisdictions, this means that the executory arrest procedure—the procedure after an enforceable title has been obtained—is included in the comparative study; however no attention is given to the conditions and functioning of the arrest procedure in general.[17] In common law, this distinction between arrest procedures is not made, which makes the determination of the scope of the elements of comparison more straightforward. Due to the delimitation of the comparison, the research will to a lesser extent deal with the issue of jurisdiction as this falls within the scope of the arrest of ships rather than within the judicial sale procedure, as the jurisdiction has already been established at the point an application for judicial sale is completed. This research will thus assume that the ship is present in the waters of the discussed jurisdiction.

Note that the standardised English language terminology is used in the national reports in order to allow comparison, but it does not necessarily correspond to the true meaning of a term in the respective domestic law. While there are, for example, some legal differences between a ship mortgage (common law) and a hypothec,[18] these differences will not play a role in the broader framework of this research and its purpose.

[17] For a complete overview and comparison of the (conservatory) arrest procedure, see: F. Berlingieri, *Berlingieri on Arrest of Ships* [London, 2011].

[18] A mortgagee usually has a broader right on the ship than a holder of a hypothec: not only can the mortgagee judicially sell the ship, he can also enforce his right by exercising actual control over the ship and receive its earnings and exercise the rights of possession. A hypothec holder can only enforce his rights by means of a judicial sale; see H. Beale, M. Bridge (et al.), *The law of security and title-based financing* [Oxford, 2012] para 18.37.

D. The Perspective

A substantial part of this research places the judicial sales of ships in a *comparative perspective*. Typically, the key act in a comparative legal study is to align and assess similarities and differences between the discussed legal systems. In this study, the comparison is used to further analyse the consequences of the divergences on the effectiveness and reliability of the judicial sale procedure in the jurisdictions subject to the study. The comparative methodology that is used in this study forms also the basis for assessing the feasibility of harmonising judicial sale procedures and fostering their acceptance.

Considering the usual international character of a judicial sale, conflict-of-law questions are very likely to arise during these procedures. This research will therefore put the comparative study, where appropriate, against a private international law background and will explore the question of the applicable law and the recognition of foreign judicial sale judgments in each jurisdiction.

Chapter 2
Existing International and European Legal Framework for Judicial Sales of Ships

Issues arising in the context of judicial sales of ships have been to a limited extent subject to harmonisation on both the international and European level. This chapter will provide a brief overview of the main international and European instruments that touch on aspects of the judicial ship sale procedure and will identify the areas which are left uncovered by international or European law. Considering that it is beyond the scope of this research to go into a detailed analysis of each article of the discussed instruments, this chapter will scrutinise the instruments only as to their relevance for judicial sales of ships.

A. International Framework

I. Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages 1926[1]

1. Background

On the issue of rights over ships, the international community attempted to harmonise the laws on several instances. The 1926 Convention is the first significant harmonising instrument out of three and entered into force in 1931, having currently 28 state parties.[2] The Convention's objective is in the first place to obtain

[1] The International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, adopted at Brussels on 10 April 1926, *LNTS*. No. 2765 and 13 *Revue de Droit Maritime Comparé* 535 (1926). Hereinafter referred to as Mortgages and Liens Convention 1926. For an article-based discussion of the Convention see D.C. Jackson, *Enforcement of maritime claims* [London, 2005] chapter 18.

[2] The current state-parties are: Belgium, Hungary, Brazil, France, Poland, Romania, Italy, Madagascar.

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international recognition of contractual security rights i.e. mortgages or hypothecs that were executed in accordance with the law of the flag. In the second place, the Convention attempts to provide a catalogue of claims that are entitled to recognition and that enjoy priority over the mortgage. The Convention's goal to create a globally accepted list of maritime liens taking preference over mortgages would offer the mortgagee more security for the loan it offered and avoid that the proprietary status of the ship changes every time it travels from one jurisdiction into another.

2. General Structure

With regard to consensual security rights, the 1926 Convention covers the recognition of "mortgages, hypothecations and other similar charges" on the ship which are created and registered in accordance with the law of the registering state to which the ship belongs.[3] The Convention thus applies the law of the flag with regard to the recognition of foreign registered mortgages. Today, this conflict-of-law rule whereby foreign mortgages on ships are governed by the law of the registry has been widely accepted.[4] The priority status of mortgages as between each other is not addressed in the Convention, though its inferior position in the ranking to liens has been regulated.[5] Regarding the latter non-consensual rights, the Convention provides a detailed order of priority, granting priority to five different types of claims: costs *custodia legis* and court costs; master and crew costs; claims arising out of salvage and general average; damage and personal injury claims; master disbursements.[6] National law may recognise other liens as well, but this will not modify the ranking of claims as set out in the Convention.[7] Different than with mortgages, the Convention also provides for an order of ranking between the various liens *inter se*.[8]

When it comes to the extinguishing of existing rights, the 1926 regime does not explicitly stipulate that the judicial sale produces a clean title for the purchaser, thus leaving any issues and formalities related to the enforcement of claims to domestic law.[9]

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[3] Mortgages and Liens Convention 1926, art. 1.

[4] For a general overview see S.M. Carbone, 'Conflits de lois en droit maritime' in 340 *Recueil des cours* [Leiden & Boston, 2010] 63–270, p 253. See also International institute for the unification of private law (UNIDROIT), Item No. 5 International Interests in Mobile Equipment in preparation of other Protocols to the Cape Town Convention, 2013, C.D. (92) 5 (c)/(d), March 2013, p 17. Available at http://www.unidroit.org/ under council documents last visited 23.03.2013.

[5] Mortgages and Liens Convention 1926, art. 3.

[6] Ibid., art. 2.

[7] Ibid., art. 3.

[8] Ibid., arts. 5 & 6.

[9] Ibid., art. 16.

3. Relevance for Judicial Sale

Even though the Convention does not explicitly deal with judicial sales of ships as such, it regulates some aspects of the procedure between contracting states. Besides the fact that the 1926 Convention could potentially speed up the recognition of foreign registered mortgages and hypothecs during the trial on the merits leading up to an enforceable title, this harmonising instrument might more importantly play a role in the post-sale phase of the judicial sale.[10] In particular, when the judicial sale fund is paid out to the various claimants, the Convention proposes a system of uniform recognition of foreign mortgages and enacts a catalogue of claims that are entitled to priority over the ship mortgage.

Although this instrument is still in force at the time of writing, it has not made for an international success with regard to the harmonisation of rights on ships and has therefore a limited relevance for judicial sales of ships.

II. Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages 1967[11]

1. Background

A subsequent Convention on the matter was prepared in 1967 and was intended to replace the 1926 regime. Notwithstanding the fact that the 1967 Convention makes some principal changes and further clarifies some aspects of its predecessor, it never entered into force.

2. General Structure

With regard to registered mortgages, the 1967 Convention takes a similar approach by appointing the law of the flag as to issues of enforceability, adding however requirements as to registration of these rights.[12] The Convention also enacted, just as its predecessor, a detailed catalogue of rights that are recognised as maritime liens.[13] Different from the 1926 Convention, the 1967 regime excluded the costs *custodia legis* and master disbursements from the list of maritime liens, adding however the possibility for state parties to include into their domestic law an extra

[10] On the condition that the Convention is applicable between the states involved.

[11] International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, adopted at Brussels on May 27 1967, Register of text of conventions and other instruments concerning international trade law, Vol. II, 1973, 179. Hereinafter referred to as Mortgages and Liens Convention 1967. The current state parties are: Sweden, Norway, Greece and Croatia.

[12] Mortgages and Liens Convention 1967, arts. 1 & 3.

[13] Ibid., arts. 4–9.

maritime lien for repair yard claims.[14] Unlike its predecessor, the 1967 Convention adds also a specific provisions on judicial sales of ships and its effects. More specifically, the Convention's provisions stipulate that the purchaser of a ship that has been judicially sold receives a clean title over the ship on the condition that the *res* was located in the jurisdiction of the contracting state and the sale has been effected in accordance with the law of the state and the 1967 Convention.[15] Moreover this Convention safeguards international recognition of the judicial sale among state parties by requiring the court selling the vessel to issue a certificate to the effect that the vessel is sold free of all mortgages, liens and other encumbrances, binding the ship registry to delete all charges from its registry and register the vessel in the name of the new owner or issue a certificate of de-registration in order to enable the new owner to register the ship in a registry of his choice.[16] It is however not clear whether the provision is solely applicable to the ship registry of the state whose courts ordered the sale, or whether it also requires the ship registry of another state party to the Convention to give this effect to a certificate of a judicial sale issued by the foreign court. Moreover, the Convention does not provide any provisions covering the judicial sale that resulted from enforcing a claim other than the types of liens and mortgages covered by the Convention, limiting the applicability of the instrument.[17]

3. Relevance to Judicial Sale

Although this Convention lays down some specific rules on the judicial sale of a ship,[18] the relevance of this international instrument to judicial sales of ships is very limited due to the fact that this Convention never entered into force.

III. Geneva Convention on Maritime Liens and Mortgages 1993[19]

1. Background

The lack of success of both the 1926 and 1967 Conventions resulted in this last harmonisation effort in the field of the enforcement of proprietary security rights

[14] Ibid., art. 6.2.

[15] Ibid., art. 11.1 (a)(b).

[16] Ibid., art. 11.3.

[17] This could be, for example, a claim for bunker supplies.

[18] Mortgages and Liens Convention 1967, arts. 10 & 11.

[19] International Convention on Maritime Liens and Mortgages, adopted at Geneva on 6 May 1993, *UNTS* Vol. 2276, p. 39, Doc. A/CONF.162/7. Hereinafter referred to as Mortgages and Liens Convention 1993.

over ships. The 1993 Convention entered into force in 2004 and currently 17 states are parties to the Convention, of which only the minority are considered to be ship registration states.[20]

2. General Structure

The 1993 Convention follows the same structure as the 1926 and 1967 Conventions, covering both the recognition of foreign mortgages[21] and liens with their priority status.[22] Just as the 1967 Convention, the 1993 Convention enacted rules as to the notice,[23] recognition and effects[24] of a judicial sale of a ship.

With regard to mortgages on the ship, the 1993 regime follows the pattern of its two predecessors.[25] Compared to the former Convention on the matter, the 1993 Convention gives the mortgagee a more favourable position by reducing the catalogue of prioritised maritime liens.[26] More in particular, the Convention excludes oil pollution damages from the list of maritime liens and downgrades also the priority of domestic maritime liens for repair claims.[27]

With regard to the recognition of a judicial sale, the Convention provides, similar to the 1967 regime, a provision introducing the certificate proving the foreign sale, whereupon the registry is bound to delete the registered charges and register the vessel in the name of the new owner or issue a certificate of deregistration for the purpose of new registration.[28] Again, it is not entirely clear and there is no existing case law interpreting whether this provision is solely applicable to the ship registry of the state whose courts ordered the sale or whether it is directed to foreign registries. In line with the 1967 regime, the 1993 Convention stipulates that the judicial sale will only be recognised if it is notified to the authority in charge of the register in the state of registration, the (known) claimants and the registered owner of the ship. The 1993 Convention, moreover, adds specific formal requirements for this notice that the executing state has to comply with in

[20] The current state parties are: Albania, Benin, Ecuador, Estonia, Lithuania, Monaco, Nigeria, Peru, Russian Federation, Serbia, Spain, St. Kitts and Nevis, St. Vincent and the Grenadines, Syria, Tunisia, Ukraine and Vanuatu.

[21] Mortgages and Liens Convention 1993, art. 1.

[22] Ibid., arts. 4–6.

[23] Ibid., art. 11.

[24] Ibid., art. 12.

[25] For a comparative overview of the differences between the 1926, 1967 and 1993 Conventions see D.C. Jackson, *Enforcement of maritime claims* [London, 2005] chapter 18.8 and F. Berlingieri, *The 1993 Convention on Maritime Liens and Mortgages* in: Lloyds Maritime and Commercial Law Quarterly [London, 1995] 57–76.

[26] Mortgages and Liens Convention 1993, art. 4.

[27] Ibid., arts. 4.2 & 6(c).

[28] Ibid., art. 12.5.

order to have the ship sold free of all encumbrances.[29] Just as its predecessor, the provisions concerning notice and the legal effects of a judicial sale are only seen within the limited framework of the Convention, leaving out the judicial sale resulting from claims that are not mentioned by the Convention.

3. Relevance to Judicial Sale

Like the 1926 and 1967 Convention, the 1993 Convention has proven to be of limited success. Notwithstanding this fact, the Convention lays down important rules as to judicial sales of ships.

IV. Arrest Convention 1952 & 1999[30]

1. Background

The arrest of ships has been subject to extensive harmonisation on the international level. The 1952 Convention, drafted under the aegis of the CMI, entered into force in 1956 and currently has over 60 contracting states.[31] Its successor, the 1999 Convention, entered into force in 2011 and has been less successful due to its limited number of state parties.[32]

2. General Structure

Both Conventions are concerned with the conservatory arrest of ships as a protective and preservative measure. The instruments describe, among other things, for what claims the right of arrest can be exercised[33] and under what circumstances the ship can be released from its arrest.[34] Both arrest Conventions are not applicable to non-commercially operated state-owned vessels, which is in line with the 1926

[29] Ibid., art 11.

[30] International Convention relating to the arrest of seagoing ships, Brussels, 10 May 1952, *UNTS*, Vol. 439, No. 6330, p 194. Hereinafter referred to as Arrest Convention 1952; International Convention on Arrest of Ships, Geneva, 12 March 1999, UN Doc. A/CONF. 188.6. Hereinafter referred to as Arrest Convention 1999. Texts available at https://treaties.un.org. For a preparatory work on and an overview of both Conventions see F. Berlingieri, *Berlingieri on arrest of ships* [London, 2011] chapter 1.

[31] For a list of state parties to the Convention see http://www.comitemaritime.org/uploads.

[32] Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain and Syria. See https://treaties.un.org -> status of treaties.

[33] Arrest Convention 1952, art. 1(1) and Arrest Convention 1999, art. 1(1).

[34] Arrest Convention 1952, art. 5. Arrest Convention 1999, art. 4.

Brussels Convention and its 1934 protocol on the immunity of state-owned vessels, excluding such ships from "seizure, arrest or detention by any legal process, [and] any proceedings in rem".[35]

3. Relevance to Judicial Sale

The issue of judicial sale is briefly addressed in the 1999 regime to the extent that it limits the right to arrest a ship for claims in which the owner is not liable. Specifically, an arrest is allowed for claims against someone other than the owner only in those instances where—under the law of the state where the arrest is applied for—a judgment in respect of that claim can be enforced against that ship by judicial sale.[36]

Although the efficiency and reliability of the domestic arrest procedure may have an impact on the choice of forum for having a ship judicially sold, the Conventions have little bearing either on the judicial sale procedure itself or on the creation of any security rights over ships.[37] For these reasons, both Conventions are not further addressed in this research.

V. The Hague Service Convention 1965[38]

1. Background[39]

Having entered into force in 1969, the 1965 Service Convention enacts several ways to transmit judicial or extrajudicial documents from one state to another for the purpose of service in the receiving state. Moreover the Convention protects the interests of both the plaintiff and defendant in a situation of default. Different from any former international instrument addressing the matter,[40] the instrument commands wide support and currently has 68 contracting states.[41]

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[35] Art. 3. These provisions also imply that a judicial sale is not possible on state-owned vessels engaged in non-commercial service.

[36] Arrest Convention 1999, art. 3.3.

[37] Arrest Convention 1952, art. 9. Arrest Convention 1999, art. 9. Stating that "nothing in this Convention shall be construed as creating a maritime lien".

[38] Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, 15 November 1965, *UNTS,* Vol. 658, p. 163. Hereinafter referred to as 1965 Service Convention.

[39] For the full history of this Convention see www.hcch.net -> Conventions -> Service section -> Actes et document de la Dixième session (1964), *Tome* III, Notification, p 391.

[40] See for example the 1965 Convention's predecessor: Convention relative à la procédure civile, 17 July 1905, *LNTS*, Vol. 51, p 2271.

[41] See here www.hcch.net -> Conventions -> Status Charts. Last visited on 27.04.2014. The Member States of the EU, except Austria, are also parties to the Convention but as between the EU

2. General Structure

The Convention defines that it is applicable in situations "where there is occasion to transmit a judicial or extrajudicial document for service abroad".[42] Furthermore the Convention limits its scope to civil and commercial matters and is solely applicable when the address for the person to be served is known.[43] Whether documents will have to be served at all and, if this is the case, whether they will have to be served abroad or not is governed by national law and not addressed in the Convention.[44]

If the subject matter fits the scope as set out in the Convention, the transmission channels provided for under the Convention must be applied between contracting states.[45] As a main channel of transmission, the Convention prescribes that the contracting states establish a 'Central Authority' that will undertake to receive requests for service coming from other contracting states.[46] The request for service given by the authority competent under the law of the state from where the document originates has to comply with the 'Model Form'[47] annexed to the Convention and has to be accompanied by the document that needs to be served.[48] The Central Authority of the requested state will serve the document itself or shall arrange to have it served either by delivery to an addressee who accepts it voluntarily or by another method provided for in the requested state or a method requested by the applicant, unless the latter is incompatible with the law of the requested state.[49] In comparison to other methods of transmission used, such as letters rogatory,[50] this main method of transmission proposed by the Convention simplifies the means to effect service of documents in other contracting states. As alternatives to the main channel of transmission,[51] the Convention allows service also through diplomatic and consular agents,[52] postal channels,[53] direct

Member States themselves, the EU Service Regulation No. 1393/2007 will be applicable (see infra this chapter) and prevails over the 1965 Service Convention.

[42] 1965 Service Convention, art. 1.

[43] Ibid., art. 1.

[44] This allows for fictitious service that aims at avoiding service abroad by inventing different methods of service taking place within the proper boundaries of the state from where the document originates. For example, the 'remise au parquet' in France enables the authorities to have the document served by the French prosecutor, avoiding international service.

[45] 1965 Service Convention, art. 1.

[46] Ibid., art. 2.

[47] Ibid., art. 3. This model form consists of three parts: a request for service addressed to the Central Authority, a certificate confirming whether the documents have been served or not, and a summary of the document to be served.

[48] 1965 Service Convention, art. 3.

[49] Ibid., art. 5.

[50] A formal request from one court to another court requesting judicial assistance.

[51] On the same hierarchic level.

[52] 1965 Service Convention, arts. 8 & 9.

[53] Ibid., art. 10 (a).

communication between a judicial officer of the state of origin and judicial officers of the state of destination[54] and direct communication between an interested party and judicial officers of the state of destination.[55] Furthermore, the instrument has specific provisions for default situations: both prior and after a judgment in default has been given, the Convention grants the judge, respectively, the power to stay entry of the judgment[56] and the power to relieve the defendant from the effects of the expiry of the time of appeal,[57] both on the condition that certain requirements as listed in the Convention are met.

3. Relevance to Judicial Sale

At several instances before and during the course of the judicial ship sale process, national law usually requires certain documents to be served on certain persons and entities—who are often based in a foreign state—in order to properly inform the parties who will be involved in the process and ultimately avoid that the enforceable title or the judicial sale itself is challenged at a later stage.[58] When domestic law prescribes (foreign) service and both the receiving and sending parties are located in signatory states, this Convention could considerably simplify and speed up the service of documents while safeguarding the rights of the defendant or ship-owner.[59] When there is a default of appearance of the defendant in the trial on the merits, the Convention might moreover play a role—assuming that an enforceable title is necessary in the state of recognition—in assessing whether any ground for refusal of enforcement has been established and thereby whether the judicial sale can be initiated.[60]

The importance of this Convention for judicial sales of ships is however limited: the Convention primarily deals with the various methods of transmission and does not include any substantial rules or guidelines as to when and on whom the service

[54] Ibid., art. 10 (b).

[55] Ibid., art. 10 (c).

[56] Ibid., art. 15.

[57] Ibid., art. 16.

[58] See infra Chapters 3–5 for national reports.

[59] As will be discussed in the national reports, the defendant debtor is not always the ship-owner.

[60] Compare for example Brussels I Regulation, art. 45 juncto art. 34.2. Brussels I Recast, art. 46 juncto 45.1 (b). On the basis of this article, recognition and enforcement can be refused if the judgment "was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so." See also Scania Finance France SA v. Rockinger Spezial Fabric für Anhängerkupplungen GmbH & Co., C-522/03 [2005] ECR I-8638 where the Court stated that "the question whether the document instituting the proceedings was duly served on a defendant in default of appearance must be determined in the light of the provisions of that [*the Hague Service*] Convention."

of a particular judicial or extrajudicial document is required. Moreover, the Convention does not regulate when exactly international service is needed. On these matters, national law is given free path.[61] Thus, when a certain domestic law lacks provisions on the service of, for example, a court order for judicial sale, the Convention will evidently not come into action.

B. European Framework

I. Brussels I Regulation[62] and Brussels I Recast[63]

The EU has set itself the objective to obtain free movement of judgments in civil and commercial matters[64] and has therefore developed over the years several instruments to harmonise the national rules on conflict of jurisdictions and to ensure rapid and straightforward recognition and enforcement of judgments given in an EU Member State.[65] The Brussels I Regulation and its recent Recast are the latest generation of efforts in the field of harmonising rules concerning the jurisdiction, recognition and enforcement of judgments in civil and commercial matters in the EU. This Regulation is a result of a long development and goes hand in hand with the political changes on the European level.[66]

1. Background

More than four decades ago, in 1968, the six founding members of the EEC—Belgium, the Netherlands, Luxembourg, Italy, Germany and France—concluded the first instrument with common rules concerning jurisdiction and recognition and enforcement of judicial decisions. The Brussels Convention of 1968[67] formed the

[61] See supra fn. 44.

[62] European Council Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Official Journal of the European Union* No. L 012, 16/01/2001, p 1–23. Hereinafter referred to as 'Brussels I Regulation'.

[63] European Council Regulation No. 1215/2012 of 12 December 2012 on jurisdiction and enforcement of judgments in civil and commercial matters, *Official Journal of the European Union,* No. L 351, 20/12/2012, p 1–32. Hereinafter referred to as Brussels I Recast.

[64] Treaty establishing the European Community, not published, art. 220.

[65] Brussels I Regulation, Recital 1.

[66] U. Magnus, P. Mankowski (eds.), *Brussels I Regulation* (Second Revised Edition) [München, 2012] 13.

[67] Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968, *Official Journal* No. L 299, 31/12/1972, p 32–42. Hereinafter referred to as 1968 Brussels Convention.

foundation for further development of judicial cooperation between the members of the Union. Over the years, the European Community enlarged considerably as to its Member States, and the instrument has been revised on several occasions.[68] The 1968 Brussels regime was, additionally, extended to non-EU Member States by means of the 1988 Lugano Convention,[69] which enabled also the free movement of judgments between the European Community and the members of the European Free Trade Association (EFTA). In 2001 the Brussels Convention was replaced by the directly applicable 2001 Brussels Regulation that is currently in force but will itself be replaced by the Brussels I Recast as from 10 January 2015.[70]

2. General Structure

After an extensive list of considerations, the Brussels I Regulation divides the provisions into eight chapters. The first chapter sets the rule as to the scope of the Regulation and determines which subject matters fall within or outside its material scope.[71] If this initial threshold is met, chapter 2 on jurisdiction limits the scope further, making the Regulation only applicable to defendants that are domiciled in the territory of an EU Member State.[72] However, if the parties agreed to confer a court or the courts of a Member State jurisdiction to settle disputes which have arisen or which may arise in connection with a particular legal relationship, the Regulation will become applicable as well, regardless of the domicile of the agreeing parties.[73] Once the Brussels I Regulation is found applicable, chapter 2 provides further rules on jurisdiction, e.g. jurisdiction grounds[74] and rules on examination as to jurisdiction and admissibility, etc. After the chapter on jurisdiction, the Regulation provides for a system of recognition and enforcement of judgments[75] given in a Member State. The objective of this chapter 3 is that the

[68] The revisions of 1978, 1982, 1989, 1996 are a result of expansion of the EU through accession of new Member States.

[69] Convention on jurisdiction and the enforcement of judgments in civil and commercial mattesr, *Official Journal* No. L 319, 25/11/1988, p 9–28. Hereinafter referred to as 1988 Lugano Convention. This Convention was also revised in 2007 in order to be in line with the Brussels I Regulation.

[70] Brussels I Recast, art. 81 on the entry into force.

[71] Brussels I Regulation, art. 1. Brussels I Recast, art. 1.

[72] Brussels I Regulation, art 2. Brussels I Recast, art. 4.

[73] Brussels I Recast, art. 25. Under article 23 of the Brussels I Regulation, there is still a requirement that at least one of the parties is domiciled in the territory of an EU Member State before the Regulation becomes applicable.

[74] Brussels I Regulation, arts. 2 & 5–24. Brussels I Recast, arts. 4 & 7–26. The Regulation distinguishes three grounds of jurisdiction: (1) jurisdiction grounds of general application (2) jurisdiction grounds for particular legal relations (insurance contracts, consumer contracts, individual contracts of employment 3) exclusive jurisdiction grounds.

[75] A judgment according to Art 32 of the Regulation is "any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court." art. 2

aforementioned documents are recognised and can be enforced in all EU Member States without any special procedures being required. This chapter 3, which stands as the most relevant for this research, also contains rules as to the grounds for refusal of recognition[76] and enforcement[77] of judgments and further stipulates that a court faced with the recognition and enforcement of a foreign EU decision cannot review the matter as to its substance[78] nor is it allowed to review the jurisdiction of the foreign court rendering the decision.[79] The other parts of the Regulation—for this research less relevant—address the recognition of court settlements and authentic instruments (chapter 4), general provisions (chapter 5), transitional provisions (chapter 6), provisions on the relation of the Regulation with other instruments (chapter 7) and the final provisions on entry into force (chapter 8).

3. Importance for Judicial Sales

Assuming that the prerequisites on material and territorial scope as set in chapters 1 and 2 are satisfied, the significance of the Regulation for the judicial sale procedure and related matters is confined to its chapter 3. This chapter, aiming at facilitating the recognition and enforcement of foreign judgments, has a dual importance for the judicial sale of ships and related procedures.

In the first place, the Regulation is of importance in the event the judicial sale accomplished in one Member State has to be recognised in another Member State. Since the court ordering the judicial sale typically confers on the purchaser a clean title over the ship, it is paramount for the integrity of the whole procedure that the sale and its proprietary effects are also recognised abroad.[80] Within its limited territorial scope, the Regulation provides a framework for the recognition of 'judgments'. Considering the wide definition of 'judgments' in the Regulation,[81] the official act declaring the ship as being sold to a certain purchaser free of all charges, whatever this decision may be called, is also covered by the recognition regime in chapter 3. Since the judicial sale decision is itself part of an enforcement procedure and has a declaratory nature, the enforcement provisions do not play a role at this instance.[82] The issue of recognition on the basis of the Regulation can

(a) Brussels I Recast adds that "for the purposes of chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter".

[76] Brussels I Regulation, art. 34 & 35. Brussels I Recast, art. 45 notwithstanding the proposal of the Commission to reduce the grounds for refusal, the Brussels I Recast did not limit this list.

[77] Brussels I Regulation, art 45 juncto 34 & 35. Brussels I Recast, art. 46 juncto 45.

[78] Brussels I Regulation, arts. 36 & 45-2. Brussels I Recast, 52.

[79] Brussels I Regulation, arts. 35-3 & 41 juncto 35. Brussels I Recast 45.3 & 46 juncto 45.

[80] See comparative summary for the importance of recognition of the judicial sale in general.

[81] See supra ftn. 75.

[82] These provisions do play a role, however, when the decision on the matter is used to initiate a judicial sale procedure. See infra.

arise either in the framework of a principal action of recognition or incidentally in the framework of other proceedings. Although rarely used, the former form of recognition might—if necessary—be requested in order to prove certain rights on the vessel and might serve as an element upon which appropriate changes to the ship registry can be made. Recognition can be furthermore raised in the latter situation i.e. as an incidental issue, when the foreign judicial sale plays an important role in the outcome of a certain dispute before a court. What the Regulation itself does not clarify as such is the exact meaning of 'recognition' and whether recognition confers on the foreign decision the (clearing) effects rendered by it in the state in which the sale took place. According to European case law, however, the court of origin determines the effects of the sale and these are, upon recognition, extended to the recognising state.[83] Generally, this means that upon recognition, all rights are extinguished under the recognising state's laws and the purchaser obtains a clean title. In principle the recognition under the Regulation takes place *ipso iure*, without any review of the foreign court's decision and without any formal (registration) procedure prior to relying on it.[84] Nevertheless, when an appeal is lodged against the recognition decision, the court may examine whether any grounds for refusal are found,[85] without reviewing the decision as to its substance[86] and without examining the jurisdiction of the court that rendered the judicial sale decision.[87] In the light of the object of this research, this would mean that if the ship is arrested in a Member State on the basis of a pre-sale claim or claim of ownership after a judicial sale was concluded free of all encumbrances in another Member State, the defendant in the arrest case can block proceedings by proving his clean title through recognition of the judicial sale decision. Under the Brussels I Regulation, the court in a Member State will in principle recognise the sale free of all encumbrances and lift the arrest unless any grounds for refusal are found when the recognition is appealed.

Lying as the basis for its success, the Brussels I Regulation[88] has enacted a very limited amount of grounds for refusing recognition of a judgment rendered in another Member State. As an example, the 'lack of jurisdiction' as a ground for refusing recognition has been extensively limited since states are barred from

[83] Horst Ludwig Martin Hoffmann v. Adelheid Krieg, (C-145/86) [1988] *ECR* 645, 666 para 10 which is in line with the Jenard Report (the report in preparation of the 1968 Brussels Convention) stating that "recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the state in which they were given" See Jenard Report to the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, *Official Journal of the European Union* 1967 C 59/1, p 43.

[84] Brussels I Regulation art. 33.1. Brussels I Recast, art. 36.1. See also S. Francq, 'Article 34: Public policy' in: U. Magnus, P. Mankowski (eds.), *Brussels I Regulation (Second Revised Edition)* [München, 2012] 639.

[85] Brussels I Regulation, arts. 34 & 35. Brussels I Recast, art. 45.

[86] Brussels I Regulation, arts. 36 & 45.2. Brussels I Recast, 52.

[87] Brussels I Regulation, art. 35.3. Brussels I Recast, 45 (3).

[88] The Brussels I Recast has enacted the same grounds for refusal of recognition.

reviewing the jurisdiction of the court in which the original judgment is given,[89] except in the few cases mentioned in the Regulation.[90] Since the exceptions to this general rule do not cover the event when the judicial sale did not take place in the presence of the ship, it would be technically possible that such sale would be recognised under the Brussels I Regulation due to the fact that the Regulation restricts any review as to jurisdiction. In practice, however, states require by law the presence of the ship in their jurisdiction[91] in order to have the ship judicially sold,[92] which makes it difficult to deny that the selling court had jurisdiction. As another relevant ground in the light of judicial sales of ships, the Regulation provides that if recognition of the decision would be "manifestly contrary to public policy in the Member State where recognition is sought",[93] then recognition can be refused. The content of the concept of 'public policy' is determined by the Member State.[94] Public policy is however rarely defined in domestic law, and its conception and interpretation can vary from state to state, often lying within the judge's discretion. This would make it often problematic—certainly in a non-European context—to guarantee that recognition is obtained abroad: a decision that constitutes a public policy infringement in one state can be perfectly legal in another.[95] However on the European level, the application of the concept as a ground for refusing recognition has been limited.[96] According to the interpretation of the ECJ, this refusal ground may be invoked only if recognition would constitute a "manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order".[97] This makes a refusal of recognition on the basis of public policy fairly unlikely, certainly when it comes to a rather straight-forward judicial sale procedure. In exceptional cases, though, a violation of public policy can be found. An example of a possible ground for refusal of recognition, the court could argue that the fact that the judicial sale of a ship was concluded on the basis of the enforcement of an award issued

[89] Brussels I Regulation, art. 35.3. Brussels I Recast, 45.3.

[90] Brussels I Regulation, art. 35.1 juncto chapter II, section 3 on jurisdiction in matters relating to insurance, section 4 on jurisdiction concerning consumer contracts, section 6 on exclusive jurisdiction. Brussels I Recast, art. 45.1(e) juncto sections 3,4,5,6 of chapter II, extending the review of jurisdiction also to employment contracts.

[91] Which waters are included in the 'jurisdiction' is usually laid down by law. See for example for the Netherlands: Wet Burgelijke Rechtsvordering van 29 maart 1828, *Stb* 14, art. 564 para 1 and 2.

[92] See also Chapters 3–5 for the national reports.

[93] Brussels I Regulation, art. 34.1. Brussels I Recast, art. 45.1(a).

[94] Brussels I Regulation, art. 34.1. Brussels I Recast, art. 45.1(a).

[95] See infra.

[96] Renault SA v. Maxicar SpA and Orazio Formento, (C.38/98) [2000] *ECR* I-2973, para. 32. S. Francq, 'Article 34: Public policy' in: U. Magnus, P. Mankowski (eds.), *Brussels I Regulation (Second Revised Edition)* [Köln, 2012] 658 on the ECJ and EU law setting the limits within which public policy can be called upon.

[97] Krombach v. Bamberski, (C-7/98) [2000] *ECR* I-1935, para 40. See also Apostolides v. Orams, (C-153/7) [2009] *ECR* I-3571, para 55–61.

against a debtor other than the ship-owner i.e. a time or voyage charterer, is manifestly violating public policy as such action might be contrary to fundamental property rights which are protected also by the first protocol of the European Convention on Human Rights.[98] In such case, the court can find the judicial sale in violation of the fundamental right of the ship-owner to peacefully enjoy his property. Furthermore, the public policy exception could theoretically also be invoked when the foreign procedure was found to violate basic protections regarding legal process.[99] In the framework of the recognition of a judicial sale in a Member State, a violation of public policy could hypothetically be raised if, for example, there was no (timely) notice of commencement of court proceedings through service of documents, i.e. warrant of (executory) arrest,[100] or in the case the sale was not published properly so that the fund in the court was diminished, affecting any non-prioritised claimants. Although the need for international service is considered to be a matter of national law, fictitious service might arguably also form a possible ground for invoking the public policy exception under the Brussels I Regulation.[101] If the recognising court finds that the lack of the latter procedural requirements caused a *manifest breach* of their public policy—within the limits set by the ECJ—then recognition of the judgment could be refused on these grounds. However, considering the fact that the public policy exception is subordinate to the other refusal grounds mentioned in the article, in particular the procedural grounds of refusal as set forth in art. 34.2,[102] the procedural public policy exception will not likely be raised.

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[98] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, ETS No. 155, 1 November 1998. See also P. Devos, Peut-on vendre judiciairement un navire pour une dette de l'affréteur?', *DMF*, 2010, 635–639. as referred to in F. Berlingieri, *The arrest of ships* [London, 2013] 234 ft. 102. This issue was also raised by C. Van Aerde during a conference of the Belgian Maritime Law Association, 60 Years Brussels Arrest Convention 1952: A critical retrospect, Antwerp, 10 May 2012.

[99] Krombach v. Bamberski, (C-7/98) [2000] *ECR* I-1935, where the ECJ asserted that the denial of the defendant's right to a lawyer could also constitute a violation of public policy.

[100] The service of documents within the EU should be in line with Council Regulation (EC) No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, *Official Journal* (2007) L 324/79. This Regulation aims at securing an effective service of documents that respects the interests of the person on whom they are served. This Regulation might help to overcome problems with regard to service of documents. The importance of the Regulation should however be seen in a nuanced light as usually the arrest is served on the master of the ship, who acts on behalf of the owner.

[101] See infra on ECJ decision Krytyna Alder and Edward Alder v. Sabina Orlowski and Czeslaw Orlowski (C-325/11) [2012] *not yet published* (ECJ court reports general) where it was decided that "where the person to be served with the judicial document resides abroad, the service of that document necessarily comes within the scope of Regulation No 1393/2007 and must, therefore, be carried out by the means put in place by the regulation to that end, as provided for by Article 1 (1) thereof" (para 25).

[102] Art. 34(2) of the Brussels I Regulation aims at protecting the defendant's right of a fair hearing. Considering that at the stage of enforcement through judicial sale there is no "hearing", nor is there a defendant, this refusal ground as well the others in art. 34 (3) and (4) are not considered.

Due to the European influence on the concept of public policy and the narrow interpretation of the jurisdictional grounds for refusal, a denial of recognition of the judicial sale on the basis of the Brussels I Regulation is therefore quite unlikely. It is thus conceivable that, in a purely European context, the recognition of a judicial sale and its effects will usually be obtained and parties can trust that the judicial sale will have effect within Europe.

Besides the recognition of judgments, the Regulation's chapter 3 might in the second place be significant when arresting a ship in an EU Member State in reliance on an enforceable title obtained in another Member State. In certain states—usually those having a civil law tradition—where an enforceable title is paramount to initiate a judicial sale, the Regulation's provisions on the enforcement of foreign decisions could significantly speed up the procedure and avoid that the arresting court has to decide on the matter again. The Brussels I Recast will furthermore abolish the so-called 'exequatur' proceeding, i.e. the requirement of a declaration from the court that the judgment is enforceable in its territory, which will speed up the enforcement procedure in another Member State. With these provisions a judgment that, for example, adjudicates a matter between a bunker supplier and a ship-owner can be enforced in another EU Member State and form a basis to initiate a judicial sale procedure. A party seeking enforcement in a Member State of a judgment rendered in another Member State will only have to submit an authentic copy of the judgment and a certificate concerning a judgment in civil and commercial matters.[103] Furthermore, these documents need to be served on the person against whom the enforcement is sought.[104] The grounds for refusing enforcement are identical to the aforementioned grounds for denying recognition of a decision.[105] The other relevant grounds for refusal of enforcement of a foreign judgment are (1) the lack of timely notice of commencement of court proceedings through service of documents[106] or (2) the existence of a conflicting decision in a Member State that is irreconcilable with another judgment given in another Member State or in a third state dealing with the same matter.[107] It is rather improbable that the former ground would be raised in this context within Europe, due to the fact that the service of documents is partially regulated on the European level, which safeguards the interests of the person on whom the decision is served.

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[103] Brussels I, art. 40 juncto art. 53. Brussels I Recast, art. 42.1 (a)(b).

[104] Brussels I Recast, art. 43.

[105] Brussels I, art. 41. Brussels I Recast, art. 46.

[106] Brussels I, art. 45 juncto art. 34.2. Brussels I Recast, art. 46 juncto 45.1(b). The service of documents within the EU must comply with the Council Regulation (EC) No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, *Official Journal* (2007) L 324/79. Compliance is required with the 1965 Hague Service Convention as well.

[107] Brussels I Regulation, art. 45 juncto art. 34.3 & 34.4. Also the existence of earlier foreign non-European decisions on the same matter forms a ground for refusing enforcement, provided of course that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

The Brussels I Regulation and its Recast are highly effective for obtaining swift enforcement of decisions on the merits, which might speed up the actual judicial sale. Furthermore, the recognition regime ensures that the integrity of the judicial sale procedure is safeguarded all over Europe. Although the European framework with regard to the jurisdiction and the recognition and enforcement of foreign decisions has been very successful in reducing the negative impact of different rules in force in several EU jurisdictions, it does not provide any solution to situations where third states are involved. Since however a judicial sale of a ship often has non-European elements, the Regulation is often not at use, causing the recognising state to rely on its domestic recognition provisions, which might fully deviate from those accepted by EU Member States.[108]

II. Service Regulation[109]

The European Community has set for itself the objective of creating an area of "freedom, security and justice in which free movement of persons is ensured".[110] In order to reach this goal, the Union has also adopted measures in the field of judicial cooperation. Not only did it take measures to harmonise laws on jurisdiction, recognition and enforcement of foreign decisions,[111] the Union also adopted rules in order to develop and accelerate the transmission of judicial and extrajudicial documents in civil and commercial matters as between Member States.[112] The Union's latest effort in this regard—the 2007 Services Regulation—facilitates the cross-border service of documents between EU countries and secures the rights of defence in case of default. The Regulation applies to all EU Member States, including Denmark.[113]

1. Background

After the failure of the European Community to adopt a Convention in 1997 on the service in Member States of judicial and extrajudicial documents in civil and commercial matters, the Council accepted in May 2000 a modified version of the

[108] See Chapter 6 for examples of what constitutes a violation of public policy in e.g. Turkey.

[109] Council Regulation (EC) No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, *Official Journal* (2007), L 324/79. Hereinafter referred to as 2007 Service Regulation.

[110] 2007 Service Regulation, Recital 1.

[111] Brussels I Regulation & Recast.

[112] 2007 Service Regulation, Recitals 1–3.

[113] Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters, *Official Journal* (2008), L 331, 10.12.2008, p 21.

Convention, in the form of a Regulation directly applicable to Member States.[114] This Regulation was reviewed and replaced in 2007 by its successor: Regulation 1393/2007, which entered into force on 13 November 2008. As between Member States, this Regulation moreover replaces the 1965 Hague Service Convention.[115]

2. General Structure

Being applicable in civil and commercial matters only, the 2007 Service Regulation becomes relevant every time a judicial or extrajudicial document has to be transmitted from one Member State[116] to another as provided for in an applicable domestic law. The Regulation is not applicable to *acta iure imperii*,[117] criminal procedures, revenue, customs and administrative matters and in the case the address of the person to be served is unknown.[118] The Regulation does not specify exactly when *international* service 'has' to take place, though recent case law has clarified that unless the aforementioned exceptions are applicable, the Regulation necessarily comes into play if the person to be served with the document resides in a Member State and that it must be carried out by the means put forward by the Regulation.[119] In order to obtain a uniform application of the Regulation, Member States are—different from the Hague Service Convention[120]—precluded from defining for themselves when a document has to be transmitted abroad for service, thus not allowing fictitious domestic service.[121]

Compatible with the object of effective service and the rights of defence envisaged in the Regulation, several modes of transmission of documents are presented.[122] As a first important method of service, the Regulation establishes designated transmitting and receiving agencies which are held responsible for the distribution and acceptance of documents.[123] The Regulation moreover also requires a central body responsible for supplying information to the transmitting agencies, solving difficulties and forwarding requests for service by the transmitting

[114] Council Regulation (EC) No 1348/2000 *Official Journal* (2000), L 160, p. 37.

[115] 2007 Service Regulation, art. 20 (1).

[116] 2007 Service Regulation, art. 1. 'Member states' in the Regulations includes all Member States except Denmark.

[117] Actions or omissions in exercise of state authority.

[118] 2007 Service Regulation, art. 1.1&1.2.

[119] Alder v. Sabina Orlowski and Czeslaw Orlowski (C-325/11) [2012] *not yet published* (ECJ court reports general) para 22–25.

[120] Opinion of Advocate General Bot, delivered on 20 September 2012 in Case *C-325/11,* para 31.

[121] Alder v. Sabina Orlowski and Czeslaw Orlowski (C-325/11) [2012] *not yet published* (ECJ court reports general), para 32. See also Opinion of Advocate General Bot, delivered on 20 September 2012 in Case *C-325/11,* para 32–49.

[122] The methods are not in order of hierarchy. See e.g. Plumex v. Young Sports C-3/05, [2006] ECR I-1579, para 19–22.

[123] 2007 Service Regulation, arts. 2,4,6 & 7.

agency to the relevant receiving agency.[124] In addition, the Regulation provides for several alternative methods of service: service by consular or diplomatic channels[125] and agents,[126] service by postal services, and service through competent judicial officials or, if applicable, other competent persons of the Member State addressed.[127] Finally, the Regulation also enacted rules as to the translation of the documents transmitted,[128] the date of service[129] and the costs connected to the service of the documents.[130]

3. Importance for Judicial Sales

Besides the obligation in most civil law states to serve the decision on the basis of which the judicial sale is initiated, national law often requires that certain documents are served on relevant persons such as the ship-owner and the debtor also during the course of the judicial sale process itself.[131] When domestic law prescribes that service has to take place and if the addressee(s) is/are domiciled within the EU, the Service Regulation becomes necessarily applicable between the transmitting and receiving states and might speed up the judicial procedure while safeguarding the rights of the defendant or ship-owner.[132]

The Service Regulation might also play a role in assessing whether any ground for refusal of enforcement exists when a claimant wishes to enforce in one Member State a judgment in default of appearance obtained in another one.[133] In other words, the judge might on the basis of the Regulation assess whether the document

[124] Ibid., art. 3 (a)–(c).

[125] Ibid., art. 14.

[126] Ibid., art. 13.

[127] Ibid., art. 15.

[128] Ibid., arts. 5 & 8.

[129] Ibid., art. 9.

[130] Ibid., art. 11.

[131] In Belgium, for example, the executory arrest, conditions of sale and minutes of adjudication will have to be served on the relevant parties. For the relevant provisions see national report on Belgium.

[132] This is true given that the exceptions to the applicability of the Regulation, provided for in art. 1 (2) are not applicable. Different than the Hague Service Convention, the ECJ case law concerning the Service Regulation does not allow fictitious service to replace service abroad.

[133] Brussels I Regulation, art. 45 juncto art. 34.2. Brussels I Recast, art. Art. 46 juncto 45.1 (b). On the basis of this article recognition and enforcement can be refused enforcement if the judgment "was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so."

in question was served on the defendant in sufficient time and in such a way as to enable the defendant to arrange for his defence.[134]

C. Conclusion

Topics related to international shipping are typically peppered with legal difficulties stemming from the lack of international harmonisation. Unlike the arrest of ships, a uniform instrument in relation to judicial sales of ships does not currently exist. Certain aspects of the judicial sale procedure have been, to a limited extent, dealt with on the international and European level; however the various harmonisation attempts appear to have been rather unsuccessful. If the judicial sale takes place in a purely European context, European law might come into play and bring harmonisation to some issues concerning the judicial sale. Although there is no European instrument on judicial sales of ships itself, some important aspects of the procedure, such as issues concerning recognition, might be covered under the legal umbrella of the EU. In the more likely case that the matter does not take place in a European context, domestic law will become applicable.

From Chapter 2 of this research it follows that some important areas connected to judicial sales of ships are not covered by international or European law. Each state determines for itself who may request and what is needed to initiate a judicial sale. Furthermore, national law determines who should be notified of the sale, on which terms the sale takes place and what effects the sale ultimately has on all the claims. Also, the governing law over the existence and ranking of rights over the ship is to a limited extent harmonised and thus further regulated by national (private international) law. Moreover, the aforementioned differences might also trigger questions as to the recognition of a judicial sale that took place under the—sometimes conflicting—laws of another state. Given the lack of harmonisation between states on these aspects of the judicial sale procedure, it is evident that the difference in laws on the matter might cause (enforcing) creditors to actively engage in 'forum shopping' in order to protect their typically highly-valued security rights in the ship.

[134] Compare Scania Finance France SA v. Rockinger Spezial Fabric für Anhängerkupplungen GmbH & Co., (C-522/03) [2005] *ECR* I-8638 where the Court in reliance on the 1965 The Hague Service Convention assessed whether proceedings have been duly served. It stated in its decision that "the question whether the document instituting the proceedings was duly served on a defendant in default of appearance must be determined in the light of the provisions of that [*the Hague Service*] Convention." Note that in this case, the Regulation was not yet in force when the events occurred.

In Chapters 3–5, the research will compare three jurisdictions in respect of the judicial ship sale procedure and will identify the main differences between the systems. The assessments are focused on the domestic law of each state and will thus not include the applicability of international or European Conventions. In its comparative summary in Chapter 6, the study will take a closer look at the differences that have an influence on the favorableness of a certain jurisdiction for the enforcing creditor.

Chapter 3
Comparative Analysis: Belgium

At the end of the nineteenth century, the Kingdom of Belgium had built up a strong maritime tradition and played a leading role in the process of the internationalisation of maritime law.[1] The Belgian initiative to establish the "Comité Maritime International" in 1897, having its headquarters in Antwerp, exemplified the importance of Belgium in the legal maritime landscape.[2] Hosting four dynamic seaports in the vicinity of one of the world's busiest seas, Belgium remains at present well-positioned on the nautical map.[3]

Belgium is a federal state[4] with a continental legal system rooted in French law.[5] The division of powers between the Federal Government, three Regions[6] and three Communities[7] is laid down in the Constitution and in numerous reform acts.[8] In principle, the vertical division of competencies between the aforementioned levels is regulated on an exclusive basis,[9] granting the federation residual competency

[1] A. Lilar, *Le Comité Maritime International 1897/1972* [1972] 10.

[2] Ibid.

[3] Ports of Antwerp, Ghent, Zeebrugge and Ostend.

[4] Belgian Constitution (coordinated), *B.S.*, 17 February 1994, art. 1.

[5] J. Gilissen, M. Magits, *Historische inleiding tot het recht* [Antwerp, 1989] 155.

[6] Flemish Region, Walloon Region and Brussels Capital Region. See the Belgian Constitution *B.S.*, 17 February 1994, art. 3.

[7] Flemish language Community, French language Community and German language Community. The Belgian Constitution (coordinated), *B.S.*, 17 February 1994, art. 2.

[8] Most importantly the Special law for the Reform of Institutions: Bijzondere Wet tot Hervorming der Instellingen, *B.S.*, 15 August 1980.

[9] J. Velaers, *De Grondwet en de Raad van State Afdeling Wetgeving* [Antwerp, 1999] 274.

L. Bleyen, *Judicial Sales of Ships*, Hamburg Studies on Maritime Affairs 36,
DOI 10.1007/978-3-319-24376-4_3

over those areas that are not explicitly assigned to a Region or Community.[10] The competence regarding ship registration and judicial sales of ships are not assigned to a particular Region or Community and thus lie with the federal Government.[11] Issues concerning ports, waterways and pilotage are in principle assigned to the relevant Community,[12] making them explicitly competent to regulate such matters. It is however noteworthy that there is currently on-going discussion and confusion about the division of powers between the Flemish Region and the Federal Government when it comes to maritime affairs in general.[13] In order to optimise the performance of the maritime legislator in Belgium, there are calls to transfer all maritime affairs to the decentralised entities, mostly to Flanders.[14]

I. Sources of Law

1. Applicable International Conventions

Regarding the relevant international instruments mentioned in Chapter 2 of this research, Belgium ratified the 1926 Mortgage and Liens Convention,[15] the 1952 Arrest Convention[16] and the 1965 Service Convention.[17] Although not explicitly

[10] This follows from Belgian Constitution (coordinated), *B.S.*, 17 February 1994, art. 35. When this article becomes effective through the necessary laws, the residual competence will be for the respective Regions and Communities. Art. 35 of the Constitution is a result of the tendency to decentralize powers to the several regions and communities in Belgium. See also E. Van Hooydonk, *Schip van staat met slagzij* [Antwerp, 2006] 125–129.

[11] The powers that the legislator did assign to communities with regard to maritime affairs are described in the Bijzondere Wet tot Hervorming der Instellingen, *B.S.*, 15 August 1980, art. 6 § 4 °3. (Special law for the Reform of Institutions).

[12] Bijzondere Wet tot Hervorming der Instellingen, *B.S.*, 15 August 1980, art. 6 § 1, X. (Special law for the Reform of Institutions).

[13] A discussion of the current problems relating to the division of powers can be found in: E. Van Hooydonk, *Schip van staat met slagzij* [Antwerp, 2006] 125–129. The author points out that the confusion is due to the poor drafting of Bijzondere Wet tot Hervorming der Instellingen, *B.S.*, 15 August 1980 (Special law for the Reform of Institutions) in combination with the contradictory rulings of the legislation section of the Council of State of Belgium and the Constitutional Court of Belgium.

[14] E. Van Hooydonk, *Schip van staat met slagzij* [Antwerp, 2006] 125–129.

[15] Ratified by Belgium on 2 June 1930. For a full list of ratifications see CMI Yearbook 2009, Part III Status of ratifications to maritime Conventions, p 450. Available at www.comitemaritime.org -> Publications (last visited 06.05.2014). This Convention is not further addressed in this research since state-owned ships are excluded from the scope.

[16] Ratified by Belgium on 10 April 1961. For a full list of ratifications CMI Yearbook 2009, Part III Status of ratifications to maritime Conventions, p 462. Available at www.cmi.org (last visited 06.05.2014).

[17] Ratified by Belgium on 19 November 1970. Status table of the 1965 The Service Convention available at www.hcch.net -> Conventions -> status charts.

mentioned in the Constitution, international conventions and Belgian domestic law are largely part of the same legal order, making Belgium a predominantly monistic state, where international law can be applied directly without any incorporation into domestic law being necessary.[18] Moreover, individuals can invoke international law directly before a Belgian court.[19]

2. Domestic Legal Sources

a) Maritime Code of 1879

The blooming of Flemish ports had triggered the development of Belgian maritime law at the beginning of the sixteenth century in the form of Royal Ordinances.[20] In the early nineteenth century, Napoleon proclaimed the *Code de Commerce* of 1807 in France that consequently also became applicable on Belgian territory.[21] The maritime-law-related content of this Code, largely based on the *Ordonnance sur le commerce des mers* of 1671, was replaced by the new Belgian Maritime Code in 1879,[22] still in force at present. Today, the Belgian Maritime Code is a part of Book II of the current Belgian *Code de Commerce*.[23] Despite the numerous amendments made to the 1879 Maritime Code, Belgian maritime law in general needs an urgent modernisation in order to strengthen the international reputation of Belgium as a provider of maritime services.[24] On the basis of a preliminary study on the shortcomings of the Maritime Code,[25] the Belgian Government proclaimed a Royal Decree regarding the establishment of a commission charged with the task of reviewing maritime private law and international law in Belgium.[26] Today, the

[18] The Constitution, however, does not explicitly point out that monism prevails. However, Since the Constitution's amendment to its article 34 on 20 July 1970, transferring certain powers to international and supranational institutions, it can be argued that monism is implied.

[19] M. Bossuyt & J. Wouters, *Grondlijnen van International Recht* [Antwerp, 2005] 147–150. Franco-Suisse Le Ski arrest, Court of Cassation, Cass. 27 mei 1971, *Arr. Cass* 1971, 959, where the court decided that civilians can directly invoke international law before a Belgian Court.

[20] F. Stevens, 'The contribution of Antwerp to the development of marine insurance in the 16th century' in: M. Huybrechts (ed.), *Marine Insurance at the turn of the Millennium* [Antwerp, 2000] 15.

[21] J. Gilissen & M. Magits, *Historische inleiding tot het recht, II, De bronnen van het recht in de Belgische gewesten sedert de dertiende eeuw* [Antwerp, 1989] 131.

[22] J. Gillisen, & F. Gorlé, *Historische inleiding tot het recht, I, Ontstaan en evolutie van de belangrijkste rechtsstelsels* [Antwerp, 1991] 211. To be more exact, the Belgian Maritime Code (hereinafter BMC) of 1879 replaced arts. 190-436 of the 1807 Code de Commerce.

[23] Belgian Commercial Code (BComm.C.), *Pasin*., 10 September 1807.

[24] Belgian Ship-owners Association, Yearly Report 2004, Antwerp, p 4 available at www.brv.be -> downloads -> jaarverslag 2004. (last visited 06.05.2014).

[25] E. Van Hooydonk, *Schip van staat met slagzij* [Antwerp, 2006].

[26] K.B. 27 April 2007 houdende de oprichting van een commissie belast met de herziening van het privaatrechterlijk en publiekrechterlijk maritiem recht, *B.S.,* 29 May 2007.

commission is still revising the complete regime of Belgian maritime law including the related procedural law which is not embedded in the Maritime Code.[27] Regrettably, the revision is not advancing as rapidly as expected, implying a delay in the implementation of a modernised Maritime Code.[28]

The Maritime Code is relevant to this study as it sets up a regime dealing specifically with maritime liens and mortgages.[29] When Belgian law is found to be applicable to the recognition of rights and to the determination of priorities between these rights in the post-sale phase, the definition of a mortgage and the catalogue of liens as prescribed in the Code become significant, certainly in the context of assessing the favourableness of the *forum* for enforcing creditors. Together with this, the Maritime Code includes the order of priority between liens and mortgages under Belgian law and the conditions applicable to the termination of priority rights.[30] Furthermore the Code also briefly addresses the effects of a judicial sale on existing liens and mortgage rights.[31] The Reform Commission is currently reconsidering its approach towards rights attached to the ship in order to better protect the holder of a mortgage right on the ship.[32] In fact, the latter's security position is likely to be endangered when the ship in questions calls at a port in a state that recognises a plethora of prioritised liens or has a conflict-of-law approach that has the effect of prioritising various foreign liens.[33]

b) Belgian Code of Civil Procedure

Besides this Maritime Code, there are several other domestic legal sources regulating certain aspects of the judicial sale procedure. The Code of Civil Procedure regulates the maritime procedural aspects of a judicial sale. The main provisions regulating the judicial sale of a ship are laid down in part V, Title III of BCCP. The laws regarding executory arrest[34] on movable objects in general are applicable to ships unless the *lex specialis* laid down in Chapter V concerning executory arrest on ships provides otherwise.[35] This Code is important with regard to the judicial sales

[27] Maritime procedural law is currently embedded in the Belgian Code of Civil Procedure (BCCP), *B.S.*, 31 October 1967.

[28] For more information about the project of the drafting committee see www.zeerecht.be (last visited 06.05.2014).

[29] BMC, chapter III.

[30] BMC, arts. 23 & 24.

[31] Liens and mortgages expire after a judicial sale of a ship, see BMC, art. 37 3°.

[32] See Blauwboek Proeve van Belgisch Scheepsvaartwetboek Privaatrecht, Blauwboek 3 schepen, available at www.zeerecht.be. (last visited 06.05.2014).

[33] This will be further addressed throughout this chapter.

[34] BCCP, arts. 1494–1544.

[35] Ibid., art. 1545.

of ships as it outlines the pre-sale formalities[36] and describes the method of judicial sale itself.[37] Moreover, the BCCP lays down the procedural aspects of the payment of creditors after the judicial sale of a ship has taken place.[38]

c) Ship Registration Act of 1990

Also relevant within the framework of the judicial sales of ships is the Ship Registration Act of 1990[39] setting out the framework for matters related to the (de)registration[40] of a ship. In particular the matter of deregistration is important in assessing the administrative effects of a (foreign) judicial sale of a (foreign) ship.[41] The Royal Decree of 1996,[42] furthermore, implements the Act by, among other means, setting out the requirements for registering a ship in Belgium[43] and listing which documents are necessary to effectuate an entry in the Belgian registry after a judicial sale of a (foreign) ship has taken place abroad.[44]

d) Belgian Code of International Private Law[45]

Due to the international character of shipping and the lack of uniformity on several levels, it is very probable that the court before which a judicial sale takes place will find itself confronted with the law of a foreign state with which no bilateral or multilateral agreement has been established. In such a case, a Belgian court will apply the provisions of the Code of International Private law to solve the issue at stake. The Code specifies, for example, which law is applicable to the recognition of foreign rights over a ship and which law will determine the order of priority.[46] The conflict-of-law approach followed will often play a role in how favourable a certain

[36] Ibid., arts. 1494–1515 & 1545–1552.

[37] Ibid., arts. 1516–1528 and 1553–1559.

[38] Ibid., arts. 1655–1675.

[39] Wet Betreffende de Registratie van Zeeschepen, *B.S.*, 29 December 1990. Hereinafter referred to as the Belgian Ship Registration Act 1990.

[40] Belgian Ship Registration Act 1990, art 4.

[41] This will be further discussed when addressing the issue of the recognition of a foreign judicial sale of a ship.

[42] K.B. betreffende de registratie van zeeschepen en het in werking treden van de wet van 21 december 1990 betreffende de registratie van zeeschepen, 4 April 1996, *B.S.*, 11 May 1996. Hereinafter referred to as Belgian Royal Ship Registration Decree 1996.

[43] Belgian Royal Ship Registration Decree 1996, art. 20 & 21.

[44] Ibid., art. 21, 3°.

[45] Wet houdende het Wetboek van international privaatrecht, *B.S.*, 27 July 2004. Hereinafter referred to as BCIPL.

[46] BCIPL, art. 89 & art. 94 § 2.

forum is for a certain creditor.[47] Also, the provisions of this Code are relevant with respect to the recognition of foreign court decisions or authentic acts evidencing a judicial sale of a ship and the clearing effects it brings about.

3. Court System

Assuming the creditor wishes to obtain an enforceable title in Belgium—a prerequisite for initiating a judicial sale in most civil law jurisdictions[48]—the Court of Commerce is held competent to decide on maritime related issues,[49] on the condition that the Belgian judge has jurisdiction to decide on the merits.[50] When an urgent matter has to be decided, the president of the Court of Commerce can also resolve the case in summary proceedings.[51] Which one of the 27 Courts of Commerce instituted in Belgium have territorial jurisdiction to decide on the merits depends on the situation.[52] When the creditor has obtained an enforceable title from a state with which Belgium has not entered into an agreement, the Court of First Instance is competent to decide whether to make the foreign document also enforceable in Belgium.[53]

Once an enforceable title is validly obtained in Belgium, the enforcing creditor can take further steps to enforce his title with the judge of arrests and seizure, a specialised judge who is part of the Court of First Instance.[54] This judge is exclusively concerned with cases involving conservatory attachments and executory arrests on all kinds of goods, including ships. The location where the ship was arrested in execution of a judgment determines the judge of seizure competent in that territory.[55] The judge of seizure appoints a public officer, i.e. a bailiff or notary, before whom the sale is carried out and who is responsible for organising the

[47] See Chapter 6.

[48] See infra on the requirement of an enforceable title.

[49] BCCP, art. 574, 7°.

[50] This study will not go into detail about the bases of jurisdiction of the Belgian Court. See on this point for example W. Tetley, 'Jurisdiction Clauses and Forum non Conveniens in the Carriage of Goods by Sea', in M. Davies (ed.), *Jurisdiction and Forum Selection in International Maritime Law* [The Hague, 2005]183, 197–198 and F. Sparka, *Jurisdiction and Arbitration Clauses in Maritime Transport Documents* [Heidelberg, 2010].

[51] BCCP, art. 584, para 2.

[52] This depends, for example, on where the enforcing creditor is domiciled or where the company is registered. BCCP, arts. 622-638bis for a description of the various grounds of jurisdiction.

[53] BCCP, art. 570 juncto BCIPL, arts. 23 §1, 27 & 31.

[54] BCCP, art. 1395. Also called: Juge de saisies (French)/Beslagrechter (Dutch).

[55] BCCP, art. 633. This is in accordance with Belgian public policy. See L. Delwaide, *Scheepsbeslag* [Antwerp, 1988] 248 and D. Chabot-Leonard, *Saisie conservatiore et saisie d'execution* [Brussel, 1979] 246.

judicial sale.[56] If not explicitly prohibited by law, one always has the right to file an appeal with the Court of Appeal[57] against any decisions of the judge of the Commercial Court and the Court of First Instance. The highest instance court in Belgium, the Court of Cassation, is competent to review decisions coming from an appellate court as to the application of law, without reviewing the matter on the merits.[58] If legal error is identified, the decision will be either annulled or referred to another court for re-assessment on the merits.[59]

The use of language in Belgian Courts is regulated by the Law of 15 June 1935. This Law prescribes that the language used by the Courts depends on where the court is located: for the Dutch and French speaking parts of Belgium, Dutch and French are the languages respectively used[60]; in the district of Eupen, the procedures will be conducted in German.[61] The language used in the bilingual agglomeration of Brussels is slightly more complicated: here the claimant can choose between French and Dutch.[62] The court will in case of dispute decide in which language it will proceed and will order appropriate translations if necessary.[63] When it comes to supporting documents, like exhibits and affidavits, filed by litigants during proceedings that are not written in the language required by the Law of 1935, the court can, on its own initiative or on the request of a litigant, order an official translation of the document into the required language at the expense of the parties.[64] The judge will in other words have the discretion to decide, on a case-by-case basis, whether a translation is necessary or not. Except in cases where the judge has ordered a translation and this order was not followed up, the court has to take into consideration all supporting documents even when those are written in another language than the one required by the law of 1935. When it comes however to procedural documents—ranging from summons, petitions and conclusions to court judgments—the rules as set forth in the 1935 Law on the use of language in court proceedings are stricter. As a general rule, a court encountering a procedural document or a certain passage in such document, that is not in conformity with the rules as enacted in the 1935 Law on the use of language in court proceedings, will *ex officio* declare the document in question void, even if litigants do not oppose or even agree on the use of a foreign language.[65] When it comes to the use of

[56] BCCP, art. 1553.

[57] BCCP, art. 602, 1°. There are only five Courts of Appeal in Belgium: located in Antwerp, Brussels, Ghent, Liege and Mons.

[58] BCCP, art. 608.

[59] Ibid.

[60] Wet op het gebruik der talen in gerechtszaken, *B.S.*, 22 June 1935, art. 1 &2.[hereinafter referred to as Taalwet].

[61] Taalwet, art 2bis.

[62] Ibid., arts. 3–4.

[63] Ibid., art. 4.

[64] Ibid., art. 8. Against the decision there is no appeal possible.

[65] Ibid., art. 40 para 1.

quotations in procedural documents, the Belgian Court of Cassation clarified in several cases that a decision of a court will only be considered null and void when the case was decided *on the basis of* a particular quotation that was written in another language than the language of the procedure and which content has not been translated or reflected in the appropriate language.[66] In another recent case before the Court of Cassation, it was decided that the quoting of a French sentence in a petition for appeal for the purpose of clarifying a ground for complaint was considered to be null and void since the quotation has not been translated nor was its content further elaborated in the petition.[67] This rather stringent view of the Court of Cassation on the use of foreign language quotation was followed in the rulings of the Court of Appeal of Antwerp that in one case found that the mere quoting of English clauses of a bill of lading in a determinative part of a court ruling, was considered to violate the law of 1935 and was therefore considered null and void.[68] In the same way, the Court of Appeal of Antwerp declared a petition null and void because the appellant quoted some English contract clauses such as "had to be paid by charterers direct to the owner nominated bank via Maronship Veenendaal" and "for further division between the brokers involved".[69] Since the content of the citation was not reflected or translated in the petition, the petition was considered to be null and void.[70] Although this ruling seems to be in line with the rather strict view of the Court of Cassation on the use of foreign languages in procedural documents, the magistrates of the Court of Appeal of Antwerp are of the opinion that the case law of the Court of Cassation has not the intention to focus on the maritime industry as such.[71] Notwithstanding the chance that courts in practise might therefore be more flexible when it comes to the use of English in maritime cases, it is important to note that parties who are considering starting judicial sale procedures in Belgium have to proceed with caution in order to ensure that all the court documents are in conformity with the 1935 Law in order to avoid delays in

[66] Court of Cassation 25 November 1987, *Pas*. 1988, I, 365. Court of Cassation 7 September 1992, *Arr Cass*., 1991–1992, IV, AR 593, 1075. Court of Cassation 15 February 1993, *Arr. Cass*. 1993, I, AR 91, 184. Court of Cassation 30 May 1996, *Arr. Cass*. 1996, IV, AR. 200, 522.

[67] Court of Cassation, 19 June 2009, Arr. Cass, AR C.08.0475.N. Available at www.cass.be. (last visited 12.05.2014).

[68] Hof van Beroep van Anwerpen, 14 May 2002, unpublished, as discussed in P. Verguts, 'Taal van de procedureakten: Dura lex, sed lex', *Europees vervoerrecht*, (220), 223. See also *Tiende Blauwboek over de herziening van het Belgisch Scheepsvaartrecht*, p 233. available at www.zeerecht.be. (last checked on 19.05.2014). In this case, the court's ruling included a bill of lading clause saying: "packing partly rust stained where uncoated and/or scratched".

[69] Hof van Beroep van Antwerpen, 2 februari 2004, *ETL*. 2004, p 216.

[70] Ibid.

[71] *Tiende Blauwboek over de herziening van het Belgisch Scheepsvaartrecht*, p 256. available at www.zeerecht.be. (last checked on 19.05.2014). In maritime case law of the Court of Appeal of Antwerp this flexible approach was however not applied. See Ibid ftn. 69, this chapter.

procedure and should also calculate the eventual translating costs of supporting documents.[72]

During the course of a judicial sale of a ship, communication between the court and the parties involved is vital. As evidenced in the following chapters, Belgian law at some occasions requires that certain documents such as the command for payment, warrant of arrest and the abstract of the sale are served on f.e. the debor of the claim(s) or the ship-owner. On Belgian territory, documents are considered to be served if the writ is handed by the bailiff to the person on whom the document should be served.[73] When it comes to legal persons, documents are deemed to be served where a writ is handed to a person or entity which represents the legal person.[74] When a person refuses to accept the writ for some reason, the bailiff will record this refusal in which case the writ is deemed to have been served on the person in question.[75] When the bailiff is unable to locate the addressee and if there is nobody in the building on whom the document could be served in his name i.e. a family member,[76] the document is considered to be served if the bailiff has left a copy of the document in a sealed envelope indicating the full name and address of the addressee and the words 'pro justitia dadelijk af te geven'[77] at the addressee's residence or domicile.[78] When it is physically impossible to effect service by leaving such a sealed envelope at the addressee's domicile or residence or when the property where the addressee is registered as resident has been abandoned, the mere fact of handing the copy to the public prosecutor competent for the geographical area will constitute service.[79]

In the likely case the person or entity on which the document should be served has a known residence or domicile abroad, the 1965 The Hague Service Convention or the 2007 Service Regulation might become applicable if the addressee is located is a state party to the Convention or in an EU Member State.[80] If these instruments are not applicable, Belgian domestic law requires the bailiff to send the writ by registered post or airmail to the (legal) person's residence or if that is not known, his domicile.[81] The document is deemed to have been served when it is remitted to the post office with acknowledgement of receipt.[82] When the residence or domicile abroad is not known, the mere fact of handing the copy to the public prosecutor

[72] This includes, specifically, those costs resulting from the court's decision to have certain documents translated. See Taalwet, art. 8.

[73] BCCP, art. 32.

[74] Ibid., art. 34.

[75] Ibid., art. 34.

[76] Ibid., art. 35.

[77] Ibid., art. 44 para 1.

[78] Ibid., art. 38 § 1.

[79] Ibid., art. 38 § 2.

[80] See Chapter 2.

[81] BCCP, art. 40 para 1.

[82] Ibid., art. 40 para 1.

competent for the geographical area will constitute valid service.[83] When it comes to judicial sales of ships, the BCCP prescribes in some cases that documents can be directly served on the master or crew present on the ship,[84] even if the master has no powers of attorney under the foreign law of the flag.[85] In fact, the Belgian *lex fori,* and not the foreign law of the flag, is applicable to determine whether a master or crew member has the authorisation to represent and act on behalf of the shipping company. In that way service abroad can be avoided. It is however questionable whether this would be in line with the EU Service Regulation.[86] When the captain and his crew are not present on the ship due to for example the ship-owner's insolvency and when the ship-owner is located outside a EU Member State or a 1965 Hague Service Convention state party, the domestic rules applicable to the service abroad will have to be applied.

II. Requirements for a Judicial Sale

Although Belgian law does not specifically list the requirements necessary to initiate a judicial sale, from the relevant provisions on the matter it can be derived that some preconditions should first be fulfilled before a judicial sale procedure can be initiated. In the first place, the provisions on the judicial sales of ships are applicable only to *seagoing and inland waterway ships*, the meaning of which will be further explained below.[87] Secondly, the BCCP requires the enforcing claimant to obtain an *enforceable title*[88] in order to consequently place the ship under *executory arrest*,[89] which constitutes the third requirement for initiating a judicial sale.

[83] Ibid., art. 40 para 2.

[84] See for example BCCP, art. 1547 para 2 & 3.

[85] Court of Cassation, 14 January 2005, *Arr. Cass.*, AR C.03.0607.N, 90. In this case, the Court of Cassation decided, finding its support in an earlier case (Court of Cassation, 5 April 1963, *Pas.*, 1963, I, 855), that the Belgian *lex fori,* and not the foreign law of the flag, is applicable to determine whether a master or crew member has the authorisation to represent and act on behalf of the shipping company ('rederij'), so that documents directed to this shipping company ('rederij') can be served on them. See also M. Godfroid, 'Vertegenwoordiging van het schip door de kapitein in België', note with Cass. 14 januari 2005, *TBH* 2005, (509), 509, nr. 5.

[86] See Chapter 2.

[87] BCCP, art. 1545.

[88] Ibid., art. 1549.

[89] BCCP, art. 1545 juncto art. 1494.

1. Asset Constitutes a Ship

As a first requirement before a judicial sale under Belgian law can be initiated on a ship, the Code of Civil Procedure requires the ship to be a seagoing or inland waterway ship.[90] In order for the judicial sale provisions to be triggered, the asset thus needs to fall within the meaning of either a seagoing or inland navigation vessel as defined by the law of the registry of the ship in question. Due to the scope of the research, only the definition of a Belgian seagoing ship will be elaborated upon here.

While numerous laws, such as the law on ship-registration[91] and the Maritime Code,[92] provide their own description of what constitutes a seagoing ship, no explicit definition is found of a seagoing ship in the Belgian Code of Procedure. Some authors therefore argue that the more apparent definition of a seagoing ship given by the Maritime Code should be applied to the Code of Civil Procedure and its provisions on both conservatory and executory arrest.[93] The Maritime Code defines all seagoing ships as "crafts of at least twenty-five tonnes, that are commonly used for the transportation of passengers or cargo, fisheries, towing or any other profitable maritime operation at sea",[94] thus including all ships with a weight equal to or above 25 tonnes engaged in a commercial operation.[95] However, the Code of Civil Procedure does not explicitly refer to the Belgian Maritime Code when it comes to defining a seagoing ship. Some Belgian lawyers therefore argue that there is no reason to use the definition of "ship" as set forth in the Maritime Code.[96] One of the arguments put forward here to support this view is that the definition in the Maritime Code itself specifies that the definition is only applicable to the Code.[97] Upon adding to this the fact that the Maritime Code, including the ship-measurements mentioned in the definition, are largely outdated, it would not be desirable to apply this definition as a requirement for initiating a judicial sale. Moreover, it is noteworthy that the Judicial Code and its provisions on conservatory

[90] BCCP, art. 1545.

[91] Belgian Ship Registration Act 1990, art. 1, para. 1.

[92] BMC, art. 1.

[93] R. Dujardin, *Bewarend en Uitvoerend scheepsbeslag* [Antwerp, 1986] 10.

[94] BMC, art. 1. For the definition of inland navigational vessels: see BMC, art. 271.

[95] This has been affirmed by the Court de Cassation, by its having stated that the "profitable maritime operation" referred to in the definition requires that there is a goal to make profit, not that the operation was itself profitable. See Court of Cassation, 12 December 2008, *Arr. Cass.*, C.07.0365.N/1 available at www.cass.be.

[96] See for example C. Van Aerde, 'Bewarend beslag op zeeschepen: welk vaartuig is een zeeschip?', in: K. Bernauw, R. De Wit, et. al. (eds), *Free on Board Liber Amicorum Marc A Huybrechts* [Antwerp, 2011] 612.

[97] Art. 1 of the Belgian Maritime Code states that "[...] for the application of this law [...]" followed by the definition of a ship.

arrest came into force many years after the Maritime Code was enacted.[98] When it comes to conservatory arrest, the Belgian Court of Cassation decided that the definition of a seagoing ship given in the Maritime Code is not applicable to the provisions on conservatory arrest.[99] Therewith, the Court of Cassation gave another definition of a seagoing ship in the light of the conservatory arrest provisions in the Code of Civil Procedure, stating that a sea-going ship constitutes "every craft that is able to sail on sea and is made thereto, even if it is not used or destined for any profitable maritime operation at sea in the sense of article 1 of the Maritime Code".[100] With this definition, the Court of Cassation indicated that there is no need for the ship in question to be engaged in a profitable maritime operation in order to fall under the regime of conservatory arrest. Notwithstanding the fact that the Court of Cassation restricted its ruling to the provisions on conservatory arrest, the rationale of the court can, arguably, be equally transferred to the provisions concerning executory arrest on ships as well. After all, a conservatory arrest can be converted into an executory arrest by application of chapter IX of the Code of Civil Procedure. Currently, the commission addressing the reform of the Maritime Code is revising the definition of a seagoing ship and will link its description with the provisions on arrest in the Code of Civil Procedure.

What the Court of Cassation does not clarify as such is which objects are considered to be part of the ship and which form separate goods that are not automatically sold with the ship. Neither the Maritime Code nor the Code of Civil Procedure or general civil law[101] addresses this issue any further. The rather scarce case law on the matter similarly fails to give any clarification.[102] Belgian authors have in this respect divided the objects on a ship between ship appurtenances and components, defining the former as objects that are not a part of the ship as such, but without which the ship will be unable to carry out its usual functions.[103] Ship components are defined in the legal literature as objects without which the ship

[98] For further explanation on this matter see C. Van Aerde, 'Bewarend beslag op zeeschepen: welk vaartuig is een zeeschip?', in: K. Bernauw, R. De Wit, et. al. (eds.), *Free on Board Liber Amicorum Marc A Huybrechts* [Antwerp, 2011] p 612.

[99] The relevant articles are BCCP, arts. 1468 & 1469. These 2 articles are the result of the implementation of the International Convention in relation to the Arrest of Sea-going Ships of 1952.

[100] Trader Arrest, Court of Cassation, 27 February 2009, *Arr. Cass.* 2009, C.07.0036.N, available at www.cass.be. (last visited 12.05.2014), *RHA* 2009, 28. The definition used by the Court de Cassation is very similar to the one used by the Belgian Ship Registration Act 1990, art. 1, §1, 4° that defines a "seagoing ship" as "every ship which is used, capable or intended for use at sea."

[101] The provisions of the BCC concerning movable objects and their individuality when incorporated in another object do not seem to be suitable for application to ships. See BCC, art. 551 & 565–577.

[102] The Court of Appeal in Antwerp, for example, gave a rather wide interpretation of what objects are considered part of the ship by generally stating that ships consist of the hull, the equipment and gear, propulsion, inventory and all the goods present. Hof van Beroep Antwerp, 5 May 2008, *RHA* 2008, p 147.

[103] L. Delwaide, *Scheepsbeslag* [Antwerp, 1988] 10–11.

would not be complete.[104] Since there is no provision in Belgian law dealing with the definition of a ship or with its connection as to appurtenances and components, it is recommendable that a potential buyer of a ship at a court sale in Belgium or on a Belgian ship inquires about the object of the sale before undertaking any action. To solve the uncertainty connected with the lack of unified definitions on this issue, the drafters of a new Belgian Maritime Code propose not only a definition of the ship, but also a full description of what constitutes a ship component and appurtenance according to Belgian law.[105] The new Code will moreover align the definitions given in the Maritime Code with the wording in the Code of Civil Procedure.[106]

Belgium is also a party to the 1926 International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Vessels and its 1934 Additional Protocol.[107] A judicial sale is therefore not possible on warships, yachts owned by the state, surveillance ships, supply ships and other ships that are owned, exploited or chartered by the state and which are, at the moment of the executory arrest, involved in a so-called *acta iure imperii*, a *non-commercial governmental service*.[108] According to the Convention, states are allowed to enter into bilateral agreements that deviate from the Convention.[109] With such an agreement, also commercially exploited state-owned vessels can be excluded from the rules on executory arrest.[110] Inspired by the 1926 Immunity Convention, Belgium regulated also the domestic immunity status of Belgian state-owned ships.[111] Due to the scope of the research, this paper will not as such go into any detail concerning the status of a national state-owned ship under domestic law.[112]

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[104] L. Delwaide, *Scheepsbeslag* [Antwerp, 1988] 10–11, W. Den Haerynck, 'Beslag op Bunkers' in: E. Van Hooydonk (ed.) Liber Amicorum Hubert Libert 89–99, 91–92.

[105] Blauwboek Proeve van Belgisch Scheepsvaartwetboek Privaatrecht, Blauwboek 3 schepen, p 66–73. available at www.zeerecht.be. (last visited 06.05.2014).

[106] Ibid., p 107–109.

[107] 1926 Immunity Convention and 1934 Immunity Protocol.

[108] Ibid.

[109] Ibid., art. 8.

[110] See for example the treaty between Belgium and the USSR on 17 November 1972, approved by law of 23 January 1974: Wet van 23 januari 1974 houdende goedkeuring van de scheepsvaartovereenkomst tussen de Belgisch-Luxemburgse Economische Unie en de Unie van Socialistische Sovjetrepublieken, van het protocol en de briefwisseling, *B.S.*, 28 March 1974.

[111] Wet 28 November 1928 tendoel hebbende het invoeren in de belgische wetgeving van beschikkingen gelijkluidend met deze van het internationaal verdrag tot het vaststellen van enige eenvormige regelen betreffende de imminuteit van staatsschepen, getekend te brussel op 10 april 1926. This law will prevail over the more general rule laid down in BCCP, art. 1412bis (incorporated in the BCCP by the Wet tot invoering van een artikel 1412bis in het Gerechtelijk Wetboek, *B.S.*, 21 juli 1994) stating that objects owned by the state cannot be the subject of a conservatory or executory arrest.

[112] See supra -> Chapter 1 Introduction -> C. Scope.

2. Enforceable Title

A prerequisite to initiating a judicial sale is that the enforcing creditor be in the possession of an enforceable title.[113] An enforceable title can either consist of a court decision obtained from a domestic or foreign court or a non-judicial authentic instrument such as a notarial deed or an arbitration award.

Provided that a Belgian Court has jurisdiction over the case, a creditor can obtain an enforceable title by initiating a court procedure in a Belgian Court.[114] He can do so while the ship is under conservatory arrest in Belgium or anywhere else in the world.[115] Although an enforceable title in Belgium can be obtained in a relatively short time, there are situations where the proceedings prove considerably lengthy.[116] If the creditor has however a Belgian mortgage satisfying the executory requirements he will be able to proceed to the executory arrest right away when the ship is located in Belgium.[117]

Unless the foreign state granting the enforceable title is subject to European Council Regulations[118] or an international/bilateral[119] agreement on the issue, the Belgian judge[120] will on the basis of the BCIPL declare the foreign title enforceable (*exequatur*) within its borders or not.[121] When a violation of Belgian public policy[122] or the right of defence[123] has been found, the judge may refuse to declare

[113] BCCP, art. 1494. The need for an enforceable title does not exist in the case of a conservatory arrest. There the creditor should file a maritime claim.

[114] On the basis of BCCP, arts. 700–730.

[115] It should be recalled that a Belgian enforceable title will have to be recognised in the state of arrest in order to start enforcement proceedings.

[116] This depends on whether the court is willing to abbreviate (BCCP, art. 708) the relatively long period as enacted in BCCP, art. 55 between the service of process and the hearing in case a defendant is domiciled outside Europe. For an example of the time calculated see B. Goemans, Onderzoek van de ondoeltreffendheid van de scheepshypotheek: Achtergrondnota ter voorbereiding van het Groenboek Nieuwe Belgische zeewet, 25 June 2007, p 6–7. Available at www.zeerecht.be -> documents, where the necessary timeframe is estimate as being as high as an average of 182 days before the procedure of executory arrest can be initiated.

[117] Hypotheekwet, *B.S.*, 22 December 1851, arts. 7 & 8. See also Beslagrechter Gent, 6 June 2006, *R.W.* 2006–2007, p 1531 stating that there is no need to serve an authentic act such as the mortgage act if it is enforced against the party mentioned in the authentic act.

[118] See on this patter Chapter 2 on the Brussels I Regulation and its Recast version. In Brussels I Recast the exequatur procedure has been abolished.

[119] Most bilateral agreements on this issue have been replaced by the recognition and enforcement instruments of the EU.

[120] The Court of First Instance is the court competent to enforce foreign enforceable judgments or authentic acts. See BCIPL, arts. 23 & 27, §2.

[121] BCIPL, arts. 22–26. For the rules on enforcement of foreign authentic instruments see BCIPL, arts. 27 & 28.

[122] BCIPL, art. 25 §1 1°. The concept of public policy will be discussed in the framework of the recognition of the judicial sale judgment.

[123] BCIPL, art. 25 §1 2°.

the foreign title enforceable. In the case of a foreign judgment, enforcement may also be refused when the judgment was obtained for the sole reason of avoiding existing Belgian Law[124] or in the case where Belgium has exclusive jurisdiction to hear the matter.[125] Also, when the foreign decision is irreconcilable with a Belgian judgment or an earlier foreign judgment that is amenable to recognition in Belgium, recognition will be refused.[126] While the court will always check whether one of these grounds for refusal have been met, the Court of First Instance where the request for recognition is made will however not re-assess the foreign judgment on its merits.[127]

Under general law, the debtor is responsible with all his assets for claims against him.[128] If the creditor wants to seize a ship, the enforceable title should therefore be, according to this general rule, against the owner of the ship. However, in the case of a *conservatory arrest* of a ship, the law has made an exception to this general rule, allowing the arrest also on the basis of maritime claims arising in relation to the ship but for which the owner of the ship is not accountable.[129] Yet, the Belgian law is not that clear when it comes to *executory arrest* of a ship in the event the debtor is not the owner of the asset. Similarly, the question might arise—after the ship has been under conservatory arrest for a claim against someone other than the ship-owner and once an enforceable title is obtained against this debtor—whether the arrest may be generally converted into an executory arrest,[130] leading up to a judicial sale of the ship on which the debtor does not have a right of property. Whether the competent court can sell a ship on the basis of an enforceable title against someone not owning the ship but whose indebtedness arises out of claims related to the ship is, however, not explicitly regulated by the Belgian Code of Procedure. Although some provisions might imply this possibility,[131] Belgian academic literature is not of the same view on this matter: The majority of authors assert that enforcement against a ship not owned by the debtor is possible, since otherwise the conservatory

[124] BCIPL, art. 25 § 1 3°. As mentioned in this article, other grounds for refusing the enforcement of judgments are related to situations where the Belgian judge finds that the judgment was beyond the competence of the foreign court granting the judgment.

[125] For a detailed list of all the grounds of refusal see Art. 25 § 1 1°-9°.

[126] BCIPL, art. 25 §1 5°.

[127] Ibid., art. 25 § 2.

[128] BCCP, art. 1413 on conservatory arrest in general. See also Hypotheekwet, *B.S.*, 22 December 1851, art. 7 stating that the debtor and his assets serve as a common guarantor for all creditors.

[129] BCCP, arts. 1468 & 1469. The Belgian Court of Cassation affirmed that the maritime claims listed in arts. 1468 & 1469 give the creditor the right to arrest the ship to preserve the claim, irrespective of the debtor being the owner of the arrested ship: Omala Case, Court of Cassation, Cass. 10 May 1976, *Arr. Cass.* 1979, AR. C.07.0036.N, available at www.cass.be. (last visited 12.05.2014).

[130] See supra on conversion of conservatory into executory arrest.

[131] BCCP, arts. 1548, 1550, 1555 & 1557 on the judicial sales of ships where the possibility of the ship-owner not being the debtor has been dealt with. Although the drafting history evidences that this possibility was only included in case a third-party possessor did not respect the procedural requirements set out in BMC, arts. 38–40.

arrest would not as such 'preserve' the right to enforce their claim on the ship and would be a mere method to put pressure on the owner and debtor which might not be consistent with the rationale of the 1952 Arrest Convention.[132] They find their support in some provisions with regard to the service of documents[133] and in several decisions in which the Belgian Courts have expressed, *obiter dictum*, that executory ship arrest is possible on the basis of claims for which the ship-owner is not responsible.[134] Other authors are of the opinion that this scenario would violate the right of property and would not be workable in the shipping business.[135] So far, no Belgian court has ruled specifically on this issue. Nevertheless, the view of the majority can arguably be found in violation with the ECHR Protocol nr. 1 on property rights,[136] art. 17 of the EU Charter of Fundamental Rights[137] and art. 16 of the Belgian Constitution,[138] since the general convertibility might harm the right of property of the ship-owner. Moreover, it is important to mention that under

[132] Devos, P., 'Peut-on vendre judiciairement un navire pour une dette de l'affréteur?', *DMF*, 2010, 635–639, 638. L. Delwaide, 'Scheepsbeslag wegens schulden van een niet-eigenaar', *RHA* 1993, (3), 16.

[133] BCCP, arts. 1548, 1550, 1555 & 1557.

[134] *Obiter dictum* of the Court of Appeal of Ghent (12 January 1988, *JHA,* 1989–1990, p 254) and the Court of Appeal of Antwerp (27 June 1991, *Jurisprudentie van de haven van Antwerpen*, 1993, p 43) mentioned that a judgment against a debtor who is not the ship-owner can be enforced by having the ship sold in a court sale. The decisions concerned were dealing with opposition proceedings by ship-owners against *conservatory arrests* on the basis of claims for which the owner is not liable and did not as such deal with the situation where a creditor would initiate a judicial ship sale procedure on the basis of an enforceable title against someone else than the owner of the ship.

[135] For a full discussion see *Tiende Blauwboek over de herziening van het Belgisch Scheepsvaartrecht*, p 144–156. available at www.zeerecht.be. (last checked on 19.05.2014).

[136] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, *ETS* No. 155, 1 November 1998. Hereinafter referred to as Protocol No. 1 ECHR. The latest case law of the ECtHR evidences that art. 1 of the Protocol is applicable to both vertical and horizontal relationships when the interference in property rights is made possible by legislation that is activated by private persons *inter se*. See for example Zehentner v. Austria [2009] 55 EHRR 22, no. 20082/02, para 71. J.A. Pye (Oxford) Ltd and Another v United Kingdom [2007] 46 *EHRR* 45, no. 44302/02., para 57, 60 & 75). This means, in other words, that the Protocol requires states to take an active role and to ensure that their domestic law sufficiently protects property rights. The Protocol might thus also be found applicable to the situation when a ship is arrested and sold on the basis of a claim for which the owner of the ship is not liable. This might for example happen on the occasion when domestic laws allow for a general convertibility of a conservatory arrest into an executory one. For more on the assessment as to whether there has been a violation of property rights in the aforementioned situation: see Sporrong and Lönnroth v. Sweden [1982] 5 *EHRR* 35, no. 7151/75.

[137] Charter of Fundamental Rights of the European Union of 18 December 2000, *Official Journal of the European Union* [2000] C 364/1). This Charter became legally binding on EU institutions and Member States on the 1st of December (with entry into force of the Treaty of Lisbon: Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community of 13 December 2007, *Official Journal of the European Union [2007]* C 306, art. 6.).

[138] Belgian Constitution (coordinated), *B.S.*, 17 February 1994.

general law of civil procedure—which is also applicable to the executory arrest of ships[139]—the owner of the property that is arrested in enforcement proceedings against another person has a right to start third party proceedings and request to divert from execution of the seized property.[140] It is not entirely clear what the Belgian Court would decide today in the event a creditor would initiate a judicial ship sale procedure on the basis of a claim for which the owner of the ship is not liable. Taking into consideration that the right of property is protected by several domestic and multilateral instruments, it would be doubtful that the court would decide in line with its previous opinion and the majority's view on the matter.

However, the importance of the question against whom—the owner and/or the debtor—the enforceable title has to be should not be overestimated: in practice this problem will rarely occur since the bank holding the mortgage will usually be the one enforcing against the ship[141] or at least paying out other claimants with the goal of either having the ship released or becoming the sole enforcer free to choose a convenient *forum*.

3. Ship Under Executory Arrest

Besides the requirement of having an enforceable title against the owner or arguably also the debtor of a claim related to an asset that constitutes a ship according to Belgian law, the procedural rules concerning the judicial sales of ships decrees that the ship must be under executory arrest on Belgian territory[142] before the actual judicial sale can take place. Two situations can be the starting point when determining how to proceed to an executory arrest: (a) the relevant ship was not yet under conservatory arrest when the enforceable title was obtained or (b) the ship was already under conservatory arrest in Belgium when the enforceable title was obtained.

a) Ship Was *Not* Under Conservatory Arrest

Assuming that the ship was not under conservatory arrest when a valid enforceable title was obtained, the debtor has to be served with a command of payment and, if no payment is obtained, with a warrant of arrest.

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[139] BCCP, art. 1545 junto art. 1514.

[140] BCCP, art. 1514.

[141] Assuming that the debtor is insolvent, it might lead to a considerable loss if a lower ranked creditor takes the initiative to enforce his money judgment, thus paying the necessary registration fees which he might not recover due to his inferior ranking.

[142] This means in Belgian internal waters including the territorial sea of Belgium as defined in the Wet van 6 October 1987 tot bepaling van de breedte van de territorial zee van Belgie, *B.S.*, 22 October 1987.

(1) Command for Payment & Service

When the ship is located within Belgian jurisdiction and when a valid enforceable title has been obtained, the claimant can arrest the ship in execution of the judgment he obtained. Before such arrest can be made, however, the bailiff will have to issue a command for payment.[143] The formal requirements this command should meet are specified in the Code of Civil Procedure. In the first place, the Code requires the inclusion of an estimate of the costs and the name and details of the addressee, the bailiff and the natural or legal person taking the initiative of the command.[144] Also, the command will have to include information as to the day, month and place of its serving.[145] Besides these general requirements applicable to all servings of writs, the Code stipulates more specific requirements applicable to a *command prior to executory arrest of movable objects*, thus including ships as well.[146] More in particular, the Code necessitates the inclusion of the address to which the debtor can direct all his legal actions.[147] Thirdly, the legislator enacted unique requirements for a *command of payment prior to the executory arrest of a ship* by requiring the command to include the amount due from the debtor and an explicit notice that in the event the payment is not fulfilled, the ship will be sold in court.[148] Furthermore, the command for payment has to include details of the relevant ship such as the name, weight, type of ship and engine.[149]

The bailiff will in the first instance serve the command of payment on the debtor or his domicile.[150] When the creditor has a maritime or prioritised claim in connection with the ship, the bailiff can also serve the command of payment on the master of the ship.[151] When the master is not present, the command may also be served on one of the officers on board. When the debtor is not the owner of the ship, the bailiff has to serve the command on the ship-owner or his agent as well.[152]

A first consequence of the service of the command on the debtor is the interruption of the prescription of the claim which led to the initiation of the procedures on executory arrest.[153] Secondly, from the moment the command has been served, interest on the amount due will begin to accrue. Thirdly, the serving of a command of payment has also repercussions with respect to the appointment of the judge who

[143] BCCP, art. 1546.

[144] Ibid., art. 43 2°- 6°.

[145] For a detailed list see BCCP, art. 43 1°.

[146] BCCP, art. 1545 juncto art. 1500.

[147] Ibid., art. 1500.

[148] Ibid., art. 1546.

[149] Ibid., art. 1546.

[150] Taking into consideration the Service Regulation or The Hague Service Convention when applicable. See Chapter 2.

[151] BCCP, art. 1547.

[152] Ibid., art. 1548.

[153] Ibid., art. 2244.

will, if necessary, conduct the executory arrest.[154] Finally, a warrant for arrest is typically issued immediately after the serving of the command in order to prevent the vessel from fleeing the jurisdiction.

The command of payment is thus the debtor's last opportunity to pay the debt to the creditor(s). If the debtor refuses to do so, the creditor can continue the proceedings on executory arrest of the ship for the purpose of selling the ship in court.[155]

(2) Warrant for Arrest & Service

In order to avoid the flight of the ship during procedures on judicial sale, the ship is usually arrested immediately after the serving of the command of payment.[156] Contrary to the regime applicable to movable objects other than ships,[157] the judicial code explicitly allows for such immediate arrest.[158]

Similar to the command of payment, also the warrant for the executory arrest of the ship has to meet some minimum formalities. Besides all the general requirements to be complied with in the command of payment,[159] the warrant for arrest should also include information on the arrestor, the debtor and amount due.[160] A description of the arrested vessel, such as the name and type of ship, should be added to the information on the warrant as well.[161] Moreover, the warrant will include a penal element sanctioning those who intentionally destroy or conceal the arrested property.[162] Furthermore, when the arrest and the command for payment are carried out at the same time, there has to be an explicit referral to both proceedings.[163] Conversely, if the warrant for arrest exists separately from the command of payment, then this has to be mentioned in the writ of execution.[164]

The service of the warrant is a necessary step before one can proceed to the actual arrest.[165] Depending on who is present on the ship, the master, an officer or a

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[154] Ibid., art. 1500.

[155] Ibid., art. 1546.

[156] When the claimant decides not to arrest directly after the command, he should beware that executory arrest has to take place within one year after the service of the command of payment. If the arrest is not carried out within that year, a new command has to be served. (BCCP, art. 1549).

[157] BCCP, art. 1499. According to the provision, one day must elapse after the service of the command of payment before the arrest can be conducted.

[158] BCCP, art. 1549.

[159] Ibid., art. 43 1°- 6°.

[160] BCCP, art. 1398.

[161] Ibid., art. 1551.

[162] Ibid., art. 1502 juncto Belgian Penal Code, Wetboek van Strafvordering, Bulletin Officiel, 27 November 1808, art. 490 bis and 507.

[163] L. Delwaide, *Scheepsbeslag* [Antwerp, 1988] 57.

[164] BCCP, art. 1551.

[165] Ibid., art. 1556.

person who has custody over the ship will have to be served.[166] When the debtor is not the owner of the ship, the warrant has to be served on the owner as well.[167] If the owner of the ship does not have his domicile within the jurisdiction of the court where the ship is arrested, the warrant has to be served on the master or someone who represents the master on the ship.[168]

When the warrant for arrest is served, the arrest of the ship has to be registered in the Belgian Ship Registry within a time period of 10 days.[169] When the ship was already under conservatory arrest in Belgium, additional registration of the arrest is however not necessary.[170] If the arrested ship is registered abroad, the Belgian Ship Registrar in Antwerp will take note of the arrest in the book of presented documents.[171] The Registry is not legally obliged to inform the foreign registry of the executory arrest or of the judicial sale.

The principal consequence of the service of the warrant for arrest is that the ship is prevented from leaving the jurisdiction. Once the ship is arrested, Belgian law will further govern the procedural elements of the judicial sale.[172] During the period of arrest, the ship-owner remains responsible to preserve the ship. The court officer can however appoint a keeper[173] or a custodian[174] whose exact task will depend on the orders given by the court. When a custodian is appointed, he will have to exercise due diligence to preserve the ship during the period of arrest.[175]

b) Ship Was Under Conservatory Arrest

It regularly occurs that a ship was already under conservatory arrest when the enforceable title is obtained. In that case, the command for payment has to be registered in the Belgian Ship Registry, within 15 days after the arrest is served.[176] In the case of a foreign ship, the registrar will take note of the arrest in the book of presented documents.[177] The command has to contain information about the conversion of conservatory arrest into executory arrest. This command replaces the warrant for arrest[178] and will upon registration convert the conservatory arrest into

[166] Ibid., art. 1550.
[167] Ibid. art. 1550.
[168] Ibid., art. 1550.
[169] Ibid. art. 1552 juncto arts. 1478–1480.
[170] See infra.
[171] BCCP, art. 1552.
[172] R. Dujardin, *Bewarend en uitvoerend scheepsbeslag* [Antwerp, 1986] 9.
[173] BCCP, art 1551.
[174] BCC, arts. 1961–1963.
[175] BCC, arts. 551 art. 1962.
[176] BCCP, art. 1497.
[177] Ibid., art. 1472.
[178] Ibid., art. 1497.

an executory arrest.[179] The question whether all conservatory arrests can be converted into executory arrests is heavily debated in the legal literature.[180] The maritime law reform might bring clarity as to this issue.[181]

III. Preparations for the Sale

1. Appointment of Public Officer

Within 8 days after the registration of the warrant for arrest or, in the event the ship is not registered in Belgium, after inscription of the arrest in the book of presented documents, the creditor has to request the competent judge of seizure[182] to appoint a public officer, i.e. a bailiff or a notary, who will be responsible for carrying out the public sale.[183] In case of a conversion of a conservatory arrest into an executory arrest, the claimant has to submit his request within 8 days after the command for payment.[184] The court in charge determines where the public sale takes place and how the sale is advertised.[185] Upon the request by petition of a concerned party, the judge of seizure is also permitted to appoint a ship-broker who will organise the sale.[186]

2. Conditions of Sale and Notification to Creditors and Claimants

The appointed public officer, also called the bailiff, drafts and advertises the conditions for sale,[187] for whose accuracy he is liable.[188] The conditions of sale

[179] Ibid., art. 1497.

[180] See supra regarding the question against who the enforceable title should be.

[181] *Tiende Blauwboek over de herziening van het Belgisch Scheepsvaartrecht*, p 144–156. available at www.zeerecht.be. (last checked at 19.05.2014).

[182] BCCP, art. 633.

[183] Ibid., art. 1553.

[184] Ibid., art. 1497.

[185] Ibid. art. 1553. In principle, the judge will decide in which newspapers the sale should be advertised.

[186] BCCP, art. 1553.

[187] Ibid., art. 1554.

[188] Hof Van Beroep van Antwerpen, 16 January 2006, *Rechtspraak van de Haven van Antwerpen*, 2007, p 208. In this case the bailiff was held liable as he included all ship appurtenances within the conditions of sale. In fact the Jacob's ladder and gangways were not supposed to be sold with the ship. On the basis of article 1382 of the Belgian Civil Code, the bailiff had to compensate the buyer.

usually include the ship details, when she was arrested, which court is in charge and when and where the sale will ultimately take place. Typically, for a court sale the stipulation that the ship is sold free of all encumbrances is stated explicitly in the conditions of sale.[189] Notwithstanding the obligation provided for in the Code of Procedure to make payment immediately after the sale has been concluded,[190] the conditions of sale often deviate from this rule by including the condition to provide a guarantee after the sale has been concluded.[191]

Additionally, at least 15 days before the sale is planned, the public officer has to notify the debtor by registered post of the possibility to look into the conditions of sale, and has to inform the debtor—and if the debtor is not the owner of the ship, the registered owner of the arrested ship—about the date and time of the public sale.[192] Also, the public officer has to notify registered[193] and opposing[194] creditors.[195] Parties interested in purchasing the ship can in practice always request an official copy of the sale conditions and an inspection of the vessel, which the public officer in charge then organises.[196]

3. Disputes and Claims for Dissolution

When someone opposes the conditions of sale, he will have to notify the public officer responsible for carrying out the sale within 8 days after the conditions of sale have been advertised.[197] The public officer will thereupon suspend the procedures and will hand over the minutes to the judge of seizure who will decide on the dispute as such.[198] There is no possibility to appeal the subsequent decision of the judge.[199]

Up until 1 day before the sale has been scheduled, creditors can ask the competent judge[200] to call off the judicial sale procedure if they have reasons to

[189] R. Dujardin, *Bewarend en Uitvoerend scheepsbeslag* [Antwerp, 1986] 63.

[190] BCCP, art. 1545 *juncto* art. 1526.

[191] B. Goemans & J. Van Praat, 'Belgium' in: C. Breitzke & J. Lux et al (eds), *Maritime Law Handbook* [London, 1998], Suppl. 13, p 14.

[192] BCCP, art. 1555, al. 1.

[193] Rights registered in the Belgian Ship Registry: see BMC, arts. 29–30. BCCP, art. 1472.

[194] Persons opposing the distribution of the proceeds to the seizing party: BCCP, arts. 1627 & 1642.

[195] BCCP, art. 1555, al. 1 and 2. Opposing creditors are persons who contest the distribution of the proceeds to the seizing party. See also Judicial Code arts. 1627 and 1642.

[196] B. Goemans & J. Van Praat, 'Belgium'in: C. Breitzke & J. Lux et al (eds), *Maritime Law Handbook* [London, 1998], Suppl. 13, p 14.

[197] BCCP, art 1555 para 3.

[198] Ibid., art 1555 para 4.

[199] Ibid., art 1555, para 4.

[200] Ibid., art. 1395.

do so.[201] Within the same timeframe, the public officer will have to serve the claim for dissolution,[202] after which the court sale is suspended and will only be resumed when the creditor renounces his claim for dissolution or when this claim has been rejected by the judge of seizure.[203]

IV. The Judicial Sale

The judicial sale of the ship will take place at the location and time as announced in the conditions of sale. Although Belgian law does not specifically prescribe a method of sale, the sale is generally conducted by public and oral auction where the potential buyers can make their bid known by hand gestures.[204] The ship will eventually be sold to the person who entered the highest bid on the day of the auction,[205] unless a higher bid is made within 15 days after the first auction day.[206] Potential purchasers thus have the right under Belgian law to place a higher bid, by means of a writ addressed to the responsible public officer, within 15 days after the first auction day, unless such right has been explicitly excluded by the conditions of sale.[207] In rare cases, the public officer can, after due motivation,[208] refuse to accept such a higher bid from those persons whose credibility is found to be highly doubtful.[209] When however the formalities of the higher bid have been properly met[210] and when a higher bid has actually been served on the public officer, a second auction day has to be organised,[211] on which the higher bid will be confirmed or superseded by an even higher one. The highest bidder on the second auction day will, in principle, acquire the ship upon immediate[212] payment of the sale price and other supplementary costs mentioned in the sale conditions[213] to the

[201] Ibid., art 1555, para 5. In case of misuse of procedural law, the creditor will be held liable on the basis of BCC, art. 1382.

[202] BCCP, art 1555, para 6 *juncto* art. 1583, para 2. Usually the public officer will also inform all parties involved in the sale procedure: L. Delwaide, Scheepsbeslag [Antwerp, 1988] 264–265.

[203] BCCP, art. 1555, para 6 juncto BCCP, art 1583, para 3.

[204] R. Dujardin, *Bewarend en Uitvoerend scheepsbeslag* [Antwerp, 1986] 68.

[205] BCCP, art. 1526.

[206] Ibid., art. 1556 juncto art. 1592.

[207] Ibid., art. 1556 juncto 1592.

[208] Ibid., art. 1592, para 5 *juncto* art. 1583.

[209] Ibid., art. 1592, para 5.

[210] The higher bid must be in accordance with the rules set out in BCCP, art. 1592, describing, among other requirements, that the higher bid should be at least 10% higher than the first bid.

[211] This to be done in accordance with all procedural formalities: BCCP, art. 1556 juncto art. 1594, requiring, among other things, the service of the writ containing the new auction day on the debtor, creditors and bidders at least 10 days before the second auction day.

[212] BCCP, art. 1545 juncto 1526. The conditions of sale might stipulate differently.

[213] E.g. interest and the costs of the sale procedure.

"Public Office of Deposits" or any other designated commercial bank.[214] When the purchaser does not comply with the conditions of sale, e.g. in the case of absence of payment, the ship will be resold at the purchaser's expense applying the same conditions of sale and advertisement procedures.[215]

The highest bid raised on the second auction day is considered to be final only after a time lapse of 15 days within which no legal action has been brought to annul the sale.[216] The latter annulment proceedings can only be initiated if there was a violation of a statutory provision that explicitly prescribes the annulment when its content has not been respected.[217] The action to annul the sale will have to be filed with the judge of seizure within 15 days counting from the date the abstract of sale has been properly served on the relevant parties.[218] *Ex officio*, also the judge can annul the sale if the prescribed time frame or format has not been respected.[219] In case no action of annulment has been brought within 15 days, the abstract of the minutes of adjudication containing information about the purchaser and the ship's auction price[220] will have to be served on the debtor,[221] the registered creditors and all of those to whom the initial arrest has been communicated.[222] If the ship is registered in the Belgian Ship Registry, the minutes of adjudication will be inscribed therein.[223] Finally, all relevant documents found on board the ship will be transferred to the buyer.[224] When the payment of the purchase price is fulfilled, the claims against the ship will now stand against the proceeds of the sale and will have to be distributed among the creditors.

[214] BCCP, art. 1657. The final adjudication has as a result also that the employment contract of the master of the vessel is terminated, this according to BCCP, art. 1558.

[215] BCCP, art. 1559. This is to occur, at the earliest, three days after a notice of payment is served.

[216] BCCP, art. 1592 *mutadis mutandis* art. 1556, para 1.

[217] Ibid., art. 1557, para 3.

[218] Ibid., art. 1557, para 3.

[219] Ibid., art. 1556, para 2 juncto arts. 1546–1550.

[220] Ibid., art. 1556, para 2 juncto art. 1594.

[221] If the debtor is not the owner, also the ship-owner will have to be served the minutes. The timeframe within which the minutes are to be served is not specified in the BCCP.

[222] BCCP, art. 1557, paras 1 and 2.

[223] Ibid., art. 1659. See supra for a discussion on the effects of a Belgian judicial sale on both Belgian and foreign registered ships.

[224] BCCP, art. 1526 bis, para 6.

V. Post-sale Phase

1. Appointment of Liquidator

No later than 8 days as from the service of the minutes of adjudication, the public officer requests the court,[225] via separate petition,[226] to appoint a liquidator.[227] Once the court has chosen a liquidator, the court's clerk will notify the liquidator of his appointment.[228] At the latest 15 days after the notification, the liquidator notifies and informs all known creditors of the possibility to a statement of claim.[229] The creditors have to file, by registered post,[230] their statements within 3 months after the date the liquidator first sent the invitation.[231] The statement should contain the amount and cause of the claim and, if applicable, any grounds for preferred ranking.[232] Not later than 15 days after the 3-month period reserved for filing statements of claim, the liquidator advises the court regarding the validity and ranking of each claim.[233] In case of disputes about the opinion formed by the liquidator, the court will hear the parties and decide on the matter.[234] The court will eventually issue a final judgment on the distribution of funds, which concludes the proceedings.[235] In rare occasions when the funds exceed the amount claimed, the creditors can receive an interim payment in order to avoid having to wait for a final judgment.[236]

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[225] The court competent to decide on the ranking of claims and payout is not specifically indicated by the provisions on ranking and payout. Although BCCP, art. 574, 7° appoints the Commercial Court to examine the claims when the fund formed in the court is paid out, some authors claim that the judge of seizure will in some courts be deemed competent to deal with this matter. Compare however Beslagrechter Gent, 22 April 1985, *TGR*, 1985, 90.

[226] BCCP, art. 1658.

[227] Ibid., art. 1658.

[228] Ibid., art. 1660.

[229] Ibid., art. 1660.

[230] Use of another method of notification is allowed as long as it has the same effect as a registered letter. See Court de Cassation, 7 January 2011, Arr. Cass. 2011, AR .08.0345.N. This is also stated in art. 867 Code of Civil Procedure.

[231] BCCP, art. 1661. The date is measured from when the liquidator *sent* it, not when creditors received it.

[232] BCCP, art. 1661. For a statement of claim no judgment is required as such.

[233] Ibid., art. 1663. For the law applicable to the validity and ranking of claims, see following subchapter.

[234] BCCP, art. 1664.

[235] Ibid., art. 1667.

[236] B. Goemans & J. Van Praat, 'Belgium'in: C. Breitzke & J. Lux et al (eds), *Maritime Law Handbook* [London, 1998], Suppl. 13, p 20.

2. Recognition and Ranking of Claims

In most cases, the fund formed in the court after the judicial sale will be insufficient to satisfy all claims. Due to the fact that most states grant priority to some claims in the payout phase, a ranking of all the claims will have to be established so as to divide the judicial sale fund accordingly. This is not without further complications, certainly considering the lack of legal uniformity on the matter. More precisely, states differ greatly from one another as to what constitutes a lien and, once the liens are recognised, how they rank *inter se* and in relation to other claims. When no international or bilateral Convention is applicable to solve the matter,[237] domestic conflict-of-law rules will govern the question whether claims exist and, if they do, what law governs their ranking. Whereas the Belgian conflict-of-law rules applicable to the existence of liens and mortgages refers to the *lex registrationis,*[238] the *lex contractus* is the law applicable to determine the existence of other (ordinary) claims in the case the claim is based on a contractual obligation[239] and the *lex loci delicti* when the claims result from extra-contractual obligations.[240] The *ranking* of all claims is governed by the *lex registrationis*.[241] This is in line with the latest case law on this issue.[242]

The designation of the *lex registrationis* as the applicable law that should determine whether a certain claim is protected by a lien and how it is ranked is however currently debated in the Belgian legal literature: In order to better protect the position of the mortgagee, the preliminary draft version of the new Maritime Law refers to the *lex fori* as to both the existence and the ranking of the prioritised claims and would therefore avoid the application of foreign law.[243] Different from liens, the newly drafted Maritime Code continues to apply the *lex registrationis-*

[237] In the case of Belgium this would be the 1926 Convention on Mortgages and Liens.

[238] BCIPL, art. 89.

[239] Ibid., art. 98. (law applicable to the contractual obligations). In case European Law is applicable, Rome I (Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations, *Official Journal of the European Union* No L177/6, 4/7/2008) will govern the existence of the claim.

[240] BCIPL, art. 99 (law applicable to obligations resulting from tort). In case European Law is applicable, Rome II (Regulation No 864/2007 of the European Parliament and of the Council of 11 July 2007, *Official Journal of the European Union* No L199/40, 31/7/2007) will necessarily come into play.

[241] BCIPL, art. 89 & art. 94 § 2. Also BMC, art. 22 implies the application of the *lex registrationis* in order to determine which rights enjoy a prioritised status and those which do not.

[242] See for example Court of Appeal Gent, 24 February 2004, *RHA*, 2006, p 27 and Court of Commerce Gent, 18 September 2001, TGR, 2001, p 326.

[243] *Tiende Blauwboek over de herziening van het Belgisch Scheepsvaartrecht*, p 211–212. available at www.zeerecht.be. (last checked 19.05.2014). The application of BCIPL, art. 89 designating the *lex registrationis* will have to be excluded from its application when the new Code is in force.

rule to the existence of mortgages, which is in line with the international approach towards the recognition of foreign mortgages.[244]

When a Belgian ship is sold in Belgium or when Belgian law has been found applicable by a foreign court, the scope of the various rights according to Belgian law and their ranking becomes relevant. In what follows, this study will have a closer look at the various claims and their position as to the distribution of sale proceeds where the *lex fori* governs the priority system.

a) Maritime Liens

In Belgian law, there are five categories of liens. Provided that the claims relate to the same voyage, the various categories are ranked in order of priority, with the first category being paid out before all the other claims of another category.[245] Claims secured by a lien and attaching to the last voyage have, in turn, priority over those attaching to voyages taking place earlier, except on the occasion of claims arising from one contract of employment extending over several voyages.[246] In that case the claims are ranked on an equal level with the claims attaching to the last voyage.[247] In principle, the prescription period of a maritime lien according to Belgian law is 1 year,[248] unless the claimant was *de facto* not in a position to arrest the ship in the waters of the state where he has his domicile, in which case the prescription period can be extended up to 3 years.[249] A prescription period of 3 years for liens might be very unfavourable for the mortgagee and the buyer of the ship that was voluntarily sold, certainly when they were not aware of the existence of this lien.[250]

The first category of liens comprises the "legal costs due to the State, expenses incurred in the common interest of the creditors in order to preserve the ship or to procure its sale, the distribution of the proceeds of sale, tonnage taxes, light or harbour dues & other public taxes and charges of the same character, pilotage dues and the cost of watching and costs incurred for watching and persevering the ship

[244] S.M. Carbone, 'Conflits de lois en droit maritime' in 340 *Recueil des cours* (Leiden & Boston, 2010) 63–270, p 253. The Belgian Court of Cassation found that pursuant to Belgian law, Belgian courts are to recognise English mortgages. Cass., 18 September 1981, *RHA* 1981-82, 424.

[245] BMC, art. 24 §1.

[246] Ibid., art. 24 §2.

[247] Ibid., art. 24 §2.

[248] Ibid., art. 37, paras 2–3, giving a list specifying the commencement of the prescription period for each claim.

[249] Ibid., art. 37, para 5.

[250] The preliminary draft of the new Belgian Maritime Code would only allow for an extension of the one-year period in case of the *legal* (and not *factual*) impossibility of arresting the ship. See for more on this issue *Tiende Blauwboek over de herziening van het Belgisch Scheepsvaartrecht*, p 239–240.

from the time of its entry into the last port".[251] If more claims of this category arise during the same voyage, the claims are dealt with on a *pro rata* basis, thus applying the proportionality principle.[252] Important to note from this list is that the port authorities are well protected in the ranking, which is not unimportant taking into account that these dues can amount to a substantial part of the total value of all claims. In fact, each day an arrested ship lies in port, costs incurred will increase, having an effect on the amount the lower ranked claimants will be paid out.[253] Enforcers therefore have an incentive to speed up procedures as much as possible, by choosing a favourable jurisdiction with an efficient and fast judicial sale system or selecting a *forum* giving low priority to harbour fees or having a conflict-of-law rule establishing a lower ranking in respect of these fees.

The second category comprises claims arising out of the employment contract of the master, crew and other persons hired on board.[254] These claims can also encompass costs such as damages for dismissal, repatriation costs, etc.[255] All costs within this category will be dealt with on an equal footing.[256]

The third category entails claims arising from assistance and salvage, and the contribution of the vessel in general average.[257] Those claims that have arisen last rank prior to claims that came into existence earlier, provided that the claims did not arise from the same occurrence, in which event they are considered to emanate at the same time.[258]

The fourth category comprises indemnities for collision or other accidents of navigation, as well as for damage caused to parts of harbours, docks, and navigable ways and indemnities for personal injury to passengers or crew. Moreover, this category also covers indemnities for loss of or damage to cargo or luggage.[259] Damage to cargo can in particular amount to a considerable sum, with a chance of impeding the position of other creditors, which is the reason why both the 1967 and the 1993 Conventions do not attribute a priority status to claims of this nature. All claims within this category are paid out on a *pro rata* basis.

Finally, the fifth category includes so-called 'master disbursements', comprising those claims resulting from contracts entered into by the master acting within his capacity for the purpose of preserving the ship or for the continuing of its voyage, whether the master is or is not at the same time owner of the vessel, and whether the

[251] BMC, art. 23, §1, 1°. This is in line with the 1926 Convention on Mortgages and Liens, art. 2.

[252] Ibid., art. 24 §1.

[253] The average port dues for a panamax bulk carrier in the port of Ghent will cost ca. $ 5,500/Day. (this figure is based on the historical port costs from a large German grain trader).

[254] BMC, art. 23 §1, 2° and 2° bis.

[255] See for example Court of Appeal Gent, 4 June 2007, *NJW,* 2007, p 937, evidencing the broad interpretation of what constitutes a claim arising out of an employment contract.

[256] BMC, art. 24 §1 para 1.

[257] Ibid., art. 23 §1, 3°.

[258] Ibid., art. 24 §1, para 2.

[259] Ibid., art. 23 §1, 4°.

claim is his own or that of ship-chandlers, repairers, lenders or other contractual creditors.[260] Nowadays, highly developed communication technologies on board a ship will avoid situations where the master of the ship has to contract someone in his personal name in order to receive the necessary services.[261]

b) Mortgages

Belgian mortgages[262] come into existence on the basis of a contract between parties,[263] and they rank immediately after the prioritised claims.[264] Different from liens, mortgages on a ship can be registered in the ship's registry. Besides contractually formed mortgages, in several instances Belgian legislation creates a mortgage right for the benefit of social security institutions and tax authorities as security for the collection of income tax,[265] value-added tax,[266] etc. These *de iure* mortgages take priority over contractual mortgages, which could potentially weaken the position of a mortgage registered in Belgium.[267]

Only those mortgages that are registered are opposable against other creditors.[268] Earlier registered mortgages rank ahead of more recently registered ones.[269]

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[260] Ibid., art. 23 §I, 5°.

[261] This category is left out of the preliminary draft of the Maritime Code.

[262] Note that the standardised English language vocabulary which is used in the reports in order to allow comparison does not necessarily correspond to the exact meaning of the term as used under domestic law. In Belgian legislation ship mortgages are referred to as 'scheepshypotheek' (Dutch) or 'L'hypothèque maritime' (French). There are however differences between a so-called maritime hypothec and a common law mortgage. A mortgage under English law gives the mortgagee the right in common law to take possession over the ship when the mortgagor has defaulted on payment of the loan or when the mortgagee's position is jeopardised due to an action or inaction of the mortgagor (Japp v. Campbell [1887] 57 *L.J.Q.B*, 79. The Myrto [1978] 1 Lloyd's Rep. 11). Moreover, "every registered mortgagee has the power, if the mortgage money or any part of it is due, to sell the ship or share in respect of which he is registered, and to give effectual receipts for the purchase money." (U.K. Merchant Shipping Act 1995, UK c.21, Schedule 1, para 9). A maritime hypothec does not give the mortgagee such rights. The holder of the maritime hypothec only enjoys a right of priority on the proceeds of the judicial sale of the ship (BMC, art. 19).

[263] BMC, art. 25.

[264] Ibid., art 19. Again, this Belgian ranking proposed here is relevant only when Belgian law is applicable to determine the ranking of the claims, i.e. when the ship is registered in Belgium.

[265] Wet houdende het Wetboek Inkomstenbelasting 1992, *B.S.*, 13 September 1993, art. 425.

[266] Wet houdende het wetboek van de belasting over de toegevoegde waarde, 3 juli 1969, *B.S.*, 17 juli 1969, art. 86.

[267] In order to improve the position of the Belgian flag, the drafters of the new Maritime Code could eliminate the *de iure* mortgages in connection with ships.

[268] BMC, arts. 31 & 32.

[269] Ibid., art. 31.

c) Unsecured Charges

In the exceptional case where there is a surplus after the mortgagee has recovered his claim, the funds are divided *pari passu* between the unsecured charges such as supplier claims, claims for delay or claims resulting from judicial acts of the shipowner.[270]

3. Effects of Belgian Judicial Sale

a) Effects on a Belgian Registered Vessel

The main legal effect of a Belgian judicial sale on a Belgian ship is the transfer of property in the ship to the highest bidder, as evidenced in the minutes of adjudication.[271] The moment the minutes are inscribed in the Ship Registry, the transfer of property becomes opposable against third parties.[272]

Besides the transfer of ownership, all liens, mortgages and other charges on the ship will cease after the judicial sale.[273] The prescribed effect is, however, not implemented *ex officio* for the registered rights and requires some formalities being undertaken on the administrative level. In order for the legal consequences of a judicial sale to have effect on these rights, all registered claimants have to agree explicitly with deregistration of their charge,[274] and if a claimant is reluctant to do so, the court has to order deregistration since the charges no longer legally exist.[275] The latter procedure might take up a considerable amount of time, as purchasers often encounter difficulties when attempting to secure proper financing for a ship on which charges are still registered.

When the purchaser of the ship wants to register the ship outside Belgium, a deregistration certificate from the Belgian registry is usually required by the foreign registry. The inscribed owner of the ship will have to submit a specific request for deregistration of the ship.[276] After the ship-registry has received this request, the registrar will notify all registered creditors and all third persons who have had an arrest inscribed against the ship inscribed.[277] The ship will eventually be deleted from the Registry 30 days after the day the aforementioned parties were notified. If

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[270] Ibid., art. 19.

[271] BCCP, art. 1545 juncto 1526.

[272] Ibid., art. 1659.

[273] BMC, art. 37, 3°.

[274] BCCP, art. 1674 and BMC, art. 35 para 1.

[275] BMC, art. 35 para 1 & 36 juncto Hypotheekwet, *B.S.*, 22 December 1851, art. 94 & 95. (hereinafter referred to as Hypotheekwet 1851).

[276] See form for the deletion from the register available at www.shipregistration.be -> downloads -> forms. (last visited 09.06.2014).

[277] Belgian Ship Registration Act 1990, art. 5 § 2.

the owner is not cooperating with the process of deregistration, it will be quite likely that the registrar will delete the registration upon presentation of the minutes of adjudication and the conditions of sale,[278] or a court will order the Registry to do so.[279] In case the new owner is a person who is not entitled to register in Belgium, the Belgian registry will *ex officio* delete the ship from its books.[280] In order to overcome the time-loss in applying for deregistration of the ship, a potential purchaser of the ship in a Belgian auction could acquire the ship in the name of an entity with a non-EU or non-EEA background in order to cause a loss of nationality, whereupon the Ship Registry might delete the ship from its registry *ex officio*.[281] It must be noted, however, that deregistration of the ship and deregistration of the charges is accomplished separately, meaning that deregistration of the ship will not itself result in the extinguishment of all registered charges on the vessel.[282] The deletion of the registered charges will still require a separate application. Until such deletion is completed, there might arise some conflict-of-law problems between the laws of the new and the old registry.

When the new owner is eligible to register the ship under the Belgian flag,[283] he can do so upon submitting the necessary changes to the Ship Registry.[284]

b) Effects on a Foreign Registered Vessel

Although the Belgian judicial sale decrees the transfer of property to the highest bidder and the extinguishment of all charges,[285] the law of the foreign ship's registry will have to determine whether or not to recognise such effects and whether to make the necessary administrative changes.[286] From a Belgian law perspective however, the *lex executionis* (here Belgian law) determines who the new owner of

[278] B. Goemans & J. Van Praat, 'Belgium' in: C. Breitzke & J. Lux et al (eds), *Maritime Law Handbook* [London, 1998], Suppl. 13, p 20.

[279] CMI Questionnaire on the judicial sales of ships, CMI Yearbook 2010, p. 336, Question 3.6 (Belgium). Available at www.comitemaritime.org -> publications -> yearbooks. (last visited 09.06.2014).

[280] Belgian Ship Registration Act 1990, art. 4 b) 4° junction art 3 §1 juncto Belgian Royal Ship Registration Decree 1996, art. 15.

[281] Ibid.

[282] Belgian Ship Registration Act 1990, art. 5 § 1.

[283] Ibid., art. 3 §1 juncto Belgian Royal Ship Registration Decree 1996, arts. 15–16 stating, *inter alia*, that the owner or operator of the ship should be an individual who is national of a Member State of the EU or domiciled or resident in Belgium. The ship in question should moreover be operated from within Belgium.

[284] Belgian Royal Ship Registration Decree 1996, art. 7 juncto 13.

[285] BCCP, art. 1545 juncto 1526 & BMC, art. 37, 3°.

[286] See infra on the recognition of a foreign judicial sale in Belgium.

the ship is, regardless of where the ship is registered or whether the ship has been deregistered at that moment.[287]

On the administrative level, the new owner who is eligible and willing to register the ship in the Belgian Ship Registry can submit a deletion certificate issued by the previous registry that evidences the status of the encumbrances on the ship in order to register the ship in Belgium.[288] If no deletion certificate is obtained from abroad or in the event the Belgian registry does not want to recognise the foreign sale, one can bring the matter always to a court of law. The registry will then be bound by the decision of the court.

VI. Recognition of a Foreign Judicial Sale and Its Legal Effects

Once a judicial sale is completed and the funds are divided among the creditors, the *lex executionis* will, unless otherwise provided, authorise the new owner to start trading with a free and clear title over the ship. Nevertheless, under customary international law, a sovereign state cannot force another state to accept its rulings, in principle reserving to each individual state the authority to assign certain legal consequences to a foreign judicial sale.[289] This might be an open door for individuals such as dissatisfied pre-sale claimants or owners who will try to contest the judicial sale in a foreign court or refuse to give consent to remove their registered rights from the registry. In all these cases, the issue of recognition of the foreign judicial sale will be raised in a court which will have to decide whether or not to recognise the validity and extend the effects of this foreign enforcement procedure in the sphere of its proper domestic law.

When there is no bilateral or international agreement applicable for determining the recognition issue, the domestic law, and, in particular private international law will govern the situation where the recognition of a foreign sale is at stake. In what follows, this part will have a closer look at the Belgian approach towards the recognition of a foreign judicial sale procedure and its effects, both on Belgian and on foreign ships.

The primary question to be asked is what the scope is of the foreign *res judicata* of the judicial sale. If according to the *lex executionis*, the decision includes the assignment of ownership to the purchaser, then the issue regarding the recognition

[287] BCIPL, art. 22.

[288] Belgian Royal Ship Registration Decree 1996, art. 21, 8°. For a full list of documents to be submitted in view of registration in the Belgian registry, see www.shipregistration.be -> downloads -> lists (last visited 09.06.2014).

[289] This customary law is for example expressed in United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, 44 *ILM* 803 (2005), UN Doc. A/Res/59/38 and the European Convention on State Immunity, Basel, 16/05/1972, *CETS*, No: 074. See also N. Shaw, *International law* [Cambridge, 2008], p 697–701.

of a foreign judicial sale has to be resolved by relying on the rules applicable to the recognition of foreign decisions. However, if the foreign decision does not encompass the title of the new owner, the issue of recognition has to be approached from a different angle by relying on the domestic conflict-of-law rules applicable to proprietary rights that are created abroad. This part will further elaborate on these approaches towards recognition in a Belgian context.

1. Recognition of a Court Decision

In the judicial practise of all EU member states, Brussels I and its chapter 3 replaces the autonomous national law regarding the recognition of foreign judgments. The instrument therefore plays a significant role in the recognition of court decisions.[290] However, in what follows, this part will only focus on the domestic private international law rules of Belgium and will thus not include situations to which European law is applicable.

In Belgium, the private international law rules related to recognition are applicable to all foreign judgments including any foreign decision rendered by an authority exercising judicial power.[291] Thus, the law also applies to a foreign decision in respect of a judicial sale of a ship assigning a clean title over the asset to the highest bidder.

As a general rule, all foreign judgments will be recognised in Belgium without there being a need to apply for a specific procedure of recognition.[292] This *de plano* recognition does however not mean that the recognition is not controlled: each authority—can be the ship registry—before which recognition is invoked, has a duty to evaluate whether recognition of the judgment could be refused on one of the grounds as laid down by art. 25 of the BCIPL.[293]

The issue of recognition might also be raised as a principal issue when a party wishes to have a final decision as to the recognition.[294] When, for example, the ship registry is hesitant to recognise the effects brought about by a foreign judicial sale, a party can apply to the Court of First Instance[295] in accordance with the procedural requirements as detailed by Belgian international private law.[296] The entire procedure will take place in written form[297] and will usually take up to 1 month counting

[290] See Chapter 2.

[291] BCIPL, art. 22 §3, 2°.

[292] Ibid., art. 22 §1 para 2.

[293] See infra under this paragraph on the -for the judicial sales of ships -, relevant refusal grounds.

[294] BCIPL, art. 22 §2.

[295] Ibid., art. 23 §1.

[296] Ibid., art. 23 §3 juncto BCCP, art. 1025–1034.

[297] BCCP, art. 1028.

from the date the application for recognition was filed.[298] The decision of the court is rendered in closed session and is only effective when the decision is not appealed.[299] When the judgment is effective, the general rule of *res judicata* precludes parties from raising the issue again within Belgian borders and administrations will give effect to the recognised decision.

If the issue of recognition is raised on an incidental basis, when for example an owner wants to oppose an arrest on his ship on the basis of a pre-sale claim, the judge before whom the principal action is brought will have the authority to rule on the recognition of the foreign judicial sale judgment.[300]

Aside from how the issue of recognition is raised, the judge or competent authority should in all circumstances evaluate, without reviewing the foreign judgment on the merits, whether recognition of the judgment could be refused on one of the grounds as laid down by law.[301] In the framework of the judicial sales of ships, the main relevant ground for refusing recognition is when the result of the recognition would be manifestly incompatible with Belgian *ordre public*.[302] With public policy the legislator meant international private law public policy, which differs from the more extensive concept of internal public policy. The distinction between internal and international public policy has been applied by the highest court of Belgium since the Vigouroux arrest where the Belgian Court of Cassation stated that a rule of internal public policy will only be a rule of international private public policy if the rule contains a principle that is paramount to safeguard the moral, political and economic order as established in Belgium.[303] The principles of Belgian international private law public policy are however not laid down in a law and depend on the circumstances of each case. The judge has thus broad discretion as to deciding whether recognition would—or would not—result in a violation ground being established but should nonetheless, upon assessing the incompatibility with Belgian public policy, give special attention to the extent in which the situation is connected to the Belgian legal order and the seriousness of the effects which will be caused thereby.[304] A mere difference in law is thus not enough to

[298] I. Couwenberg, 'Bevoegdheid en procedure voor de erkenning of de uitvoerbaarverklaring' in: S. Pertegas, P. Wautelet., et. al. (eds.), *Het wetboek Internationaal Privaatrecht Becommentarieerd – Le Code droit international privé commenté* [Antwerp, 2006] 124–135, 127.

[299] BCCP, art. 1029 and art. 1033.

[300] BCIPL, art. 22 § 1 para 2.

[301] BCIPL, art. 25. For a discussion on the grounds for refusing recognition see H. Storme, 'Erkenning en Uitvoerbaarverklaring van buitenlandse rechterlijke beslissingen' in: S. Pertegas, P. Wautelet., et. al. (eds.), *Het wetboek Internationaal Privaatrecht Becommentarieerd – Le Code droit international privé commenté* (Antwerp, 2006) 117–123, 120.

[302] BCIPL, art. 25 §1 1°.

[303] Court of Cassation, Cass. 4 mei 1950, *Pas.,* 1950, I., 624. See also Court of Cassation, Cass 2 April 1981, *Arr. Cass.* 1980-81, 869. H. Van Houtte, 'De openbare orde als beletsel voor de erkenning of tenuitvoerlegging van buitenlandse vonnissen', *Rechtskundig Weekblad*, 1973-74, 741.

[304] BCIPL, art. 21.

invoke the public policy exception.[305] Within the framework of a judicial sale of a ship, there are no cases available of what would violate Belgian public policy. One could assume that public policy is at stake when the foreign procedures leading up to the judgment did not take into consideration the rights of the known creditors by, for example, not informing them about the upcoming sale.

As another ground relevant for the topic, art. 25 of the BCIPL lists also that recognition can be refused in the event the foreign judicial sale is irreconcilable with another decision between the parties deciding on the same issue[306] or that the final judgment would still be subject to an ordinary recourse in the state where the judgment was rendered.[307]

When no ground for refusal applies, the judgment will be recognised, which implies that legal effect is given to the foreign judgment in question.[308] When the foreign judicial sale decreed that the ship had been sold free and clear of all encumbrances, this decision and the effects will thus, upon recognition, be extended to the Belgian legal order and has the effect that all parties—including Belgian authorities, interested parties and all third parties—will have to respect and accept this foreign decision.[309] Due to the fact that Belgian law extends the legal effects of the foreign decision to its proper legal order, the foreign decision cannot have more effect than it has in the state of origin.[310]

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[305] Memorie van Toelichting, Wetsvoorstel houdende het wetboek van internationaal privaatrecht, Senaat, p 49, available at www.kruispuntmi.be (last accessed 11.06.2014).

[306] BCIPL, art. 25 §1 5°.

[307] Ibid., art. 25 §1 4°. In most states however a judicial sale of a ship is final and definite. Therefore this ground of refusal is not likely to be relied on in case of a foreign judicial sale of a ship.

[308] BCIPL, art. 22 § 3. See also H. Storme, 'Erkenning en Uitvoerbaarverklaring van buitenlandse rechterlijke beslissingen' in: S. Pertegas, P. Wautelet., et. al. (eds.), *Het wetboek Internationaal Privaatrecht Becommentarieerd – Le Code droit international privé commenté* (Antwerp, 2006) 117–123, 119.

[309] Memorie van Toelichting, Wetsvoorstel houdende het wetboek van internationaal privaatrecht, Senaat, p 52, available at www.kruispuntmi.be (last accessed 11.06.2014). This is in line with the definition of recognition as set forth in the Horst Ludwig Martin Hoffmann v. Adelheid Krieg, (C-145/86) [1988] *ECR* 645, 666 para 10 stating that "recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the state in which they were given."

[310] Mayer, P., 'les méthodes de la reconnaissance en droit international privé' in: X., *Le droit international privé: esprit et méthodes – Mélanges en honneur de Paul Lagarde* [Paris, 2005] 547–573, 552. See also H. Storme, 'Erkenning en Uitvoerbaarverklaring van buitenlandse rechterlijke beslissingen' in: S. Pertegas, P. Wautelet., et. al. (eds.), *Het wetboek Internationaal Privaatrecht Becommentarieerd – Le Code droit international privé commenté* (Antwerp, 2006) 117–123, 119, ft. 8.

2. Recognition of In Rem Rights Created Abroad

If according to the *lex executionis*, the foreign judicial sale does not cover the assignment of ownership to a purchaser, the Belgian conflict-of-law rules will be in place when the acquisition or the loss of rights *in rem* abroad is questioned in Belgium. In general, Belgian conflict-of-law rules applicable to the creation and loss of rights are governed by the *lex rei sitae*, i.e. the law of the state on the territory of which the assets were located when the action or facts that are invoked as basis of the acquisition or the loss occurred.[311] Since according to Belgian conflicts law, a merchant ship is deemed to be situate at her port of registry,[312] the *lex registrationis* will thus determine whether new *in rem* rights have been created and extinguished abroad. If according to the law of the registry new rights have indeed been created and prior rights extinguished on the ship that was sold abroad, the Belgian court will give effect to the foreign judicial sale by applying its conflict-of-law rules.

3. Recognition of Foreign Judicial Sale by Ship Registry

On the administrative level, i.e. the level of the Belgian Ship Registry, the *lex registrationis* plays an important role. The Belgian registration laws point to a great degree to the application of the *lex registrationis* to determine which rights rest on the ship rather than to a judicial sale judgment changing the various rights resting on the ship. In fact, the Belgian ship registration rules imply that a foreign ship, after it has been judicially sold abroad, can only be registered in its registry if a deletion certificate was issued by the foreign registry.[313] However, it is important to note that the Belgian registry is subject to judicial review and is bound by the BCIPL and the Brussels I Regulation. Thus, if the Belgian court recognised the foreign judicial sale and its clearing effects, the Belgian registry will have to give full effect to this Belgian decision. Nonetheless, obtaining a review decision in a Belgian Court might be a practical hindrance and cost additional time which is to the disadvantage of the purchaser of the ship who is willing to register the ship in Belgium.

[311] BCIPL, art. 87 § 1 para 2.

[312] Ibid., art. 89.

[313] Belgian Royal Ship Registration Decree 1996, art. 21, 8°. For a list of requirements to obtain registration of a ship in the Belgian registry, see official site www.shipregistration.be -> downloads -> lists (last visited 09.06.2014).

Chapter 4
Comparative Analysis: The Netherlands

The Netherlands is a constituent monarchic state within the Kingdom of the Netherlands[1]; largely located in Western Europe, it also includes three so-called 'special municipalities', all located in the Caribbean region.[2] Throughout the centuries, the Netherlands fostered a strong nautical tradition that is still noticeable today.[3] Each year, over 35,000 seagoing ships call at the port of Rotterdam, currently Europe's largest port.[4] On a regular basis a considerable amount of ships are, moreover, arrested and auctioned within Dutch waters. Due to the global maritime importance of the Netherlands, it is indispensable that the jurisdiction be included in the comparison and that Dutch law on judicial sales of ships be scrutinised, particularly as concerns the attraction it holds for involved parties.

This chapter will research on the Dutch law applicable to the different stages of a judicial ship sale. The first four chapters will highlight the Dutch domestic procedural laws on judicial sales of ships. These laws will apply to any judicial sale procedure initiated for both national and foreign ships. The second to last chapter deals with the laws applicable to the ranking of claims after a sale of a Dutch or foreign ship takes place. The final part deals with Dutch law on the recognition of a foreign judicial ship sale and its legal effects.

[1] Besides the Netherlands, the Kingdom of the Netherlands also includes three other 'countries', namely Curacao, Aruba and Sint-Maarten. These independent 'countries' within the Kingdom are located in the Caribbean and have their own parliaments and heads of state but are dependent on the Netherlands for matters related to foreign policy and defence. See Grondwet voor het Koninkrijk der Nederlanden van 24 Augustus 1815, chapter 2, art. 24–49.

[2] The three special municipalities are Bonaire, Saba and St. Eustatius.

[3] J. de Vries & A. van der Woude, *Nederland 1500–1815: de eerste ronde van moderne economische groei* [Amsterdam, 1995] 411–581.

[4] De haven van Rotterdam in cijfers, 2009–2011, available at http://www.portofrotterdam.com (last visited on 01/03/2012).

L. Bleyen, *Judicial Sales of Ships*, Hamburg Studies on Maritime Affairs 36,
DOI 10.1007/978-3-319-24376-4_4

I. Sources of Law

1. Applicable International Conventions

From the relevant international instruments mentioned in Chapter 2 of this research, the Netherlands has ratified only the 1952 Arrest Convention[5] and the 1965 Service Convention.[6] Moreover, the Netherlands is bound by European law. Since the Netherlands has a monistic position towards international law, international Conventions approved by the parliament are automatically incorporated into national law.[7]

2. Domestic Legal Sources

a) Book 8 on Transportation Law[8]

Book 8 of the current Dutch Civil Code covers law related to all means of transportation, including maritime transport. Even though the governmental drafting committee responsible for book 8 was formed in 1961 and the first draft—including the general regulations on maritime transport—was completed in 1972, it was not until 1991 that the main parts of the book entered into force.[9]

Book 8 is relevant for this study as it sets up a regime dealing specifically with maritime liens and mortgages.[10] When Dutch law is found to be applicable as regards the recognition of rights and the determination of priorities between these rights in the post-sale phase, the provisions concerning the mortgages and liens and their ranking become significant. Also, book 8 contains general provisions that are significant for all chapters of book 8 as well as the Code of Civil Procedure. As an

[5] This Convention was ratified by the Netherlands on 20 January 1983. For a full list of ratifications CMI Yearbook 2009, Part III Status of ratifications to maritime Conventions, p 463. see www.comitemaritime.org ->publications-> yearbook. (last visited on 06.05.2014).

[6] This Convention was ratified by the Netherlands on 16 November 1965. Status table of the 1965 Service Convention available at www.hcch.net -> Conventions -> status charts. (last visited on 06.05.2014).

[7] Grondwet voor het Koninkrijk der Nederlanden van 24 Augustus 1815, chapter 5, art. 91.

[8] Book 8 entered into force pursuant to the K.B. 4 March 1991, *Stb*. 1991, 100 on 1 April 1991. Hereinafter referred to as DCC book 8.

[9] For the drafting history of book 8 please see M.H. Claringbould, *Parlementaire Geschiedenis van het nieuw Burgerlijk Wetboek* [Rotterdam, 1992] XIII-XVI. R. Cleton, *Hoofdlijnen van het vervoerrecht* [Den Haag, 1994] 6–9. W.J. Oostwouder, *Hoofdzaken Boek 8 BW: Verkeersmiddelen en vervoer* [Deventer, 1994] 8–10. For more on the drafting history of the entire Dutch Civil Code see J.H.A. Lokin, W.J. Zwalve, *Hoofdstukken uit de Europese Codificatiegeschiedenis* [Deventer, 2001] 300–310.

[10] DCC book 8, arts. 204 & 210–219.

example, book 8 defines a ship and a seagoing ship in its arts 1 & 2, and, moreover, it delimits the concepts of ship appurtenances and ship components. These general provisions play an important role in defining which parts of the asset are subject to the judicial sale procedure. Besides the general provisions and the maritime priorities, book 8 is also significant for this research since it contains rules as to (de) registration of a ship, and perhaps more importantly it contains rules as to when (de) registration of the ship is possible.[11]

b) Dutch Code of Civil Procedure[12]

The DCCP is, despite several reforms, still based on the French *Code de procédure civile* of 1806, which finds its roots in the *Ordonnance civile pour la réformation de la justice* of Louis XIV of 1667.[13] The Code contains rules with regard to the competent judge and forms the main body of procedural rules on the executory arrest and the judicial sale of a ship. More in particular it outlines the pre-sale formalities[14] and the method of judicial sale.[15]

c) Ship Registration

Whereas book 8 regulates on which occasions a ship can be registered and deregistered, the pure administrative rules on the content of the registration for ships and modifications of the registration can be found in the Law on Public Registers.[16] This framework law, moreover, regulates the task of the public registry in general and regulates the right of access to the registry. The subordinate decree on registered ships of 1992[17] and its ministerial regulation on registered ships of 1994[18] constitute more detailed rules on the ship registry.

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[11] Ibid., arts. 194 & 195, which are further refined by Maatregel teboekgestelde schepen van 1992, *Stb*. 1992, 572, arts. 14 & 19.

[12] Wet Burgerlijke Rechtsvordering van 29 maart 1828, *Stb* 14. Hereinafter referred to as DCCP.

[13] For a detailed overview on all the amendments to the DCCP, see C.J.J.C. Van Nispen, De terloopse hercodificatie van ons burgerlijk procesrecht [Deventer, 1993]; W. Hugenholtz, W.H. Heemskerk, *Hoofdlijnen van Nederlands burgerlijk procesrecht* [Den Haag, 2012].

[14] DCCP, arts. 563–569.

[15] Ibid., art. 575 para 5.

[16] Wet van 3 mei 1989, houdende regelen met betrekking tot de openbare registers voor registergoederen, alsmede met betrekking to het kadaster, *Stb*. 1989, 186, arts. 85–91. Also called the "Kadasterwet".

[17] Besluit van 6 november 1991, houdende vaststeling van het kadasterbesluit, *Stb*. 1991, 571. Hereinafter referred to as 1991 Kadasterbesluit. More in particular chapter 1 regulates the way in which the registry of ships has to be kept.

[18] Uitvoeringsregeling Kadasterwet 1994, *Stcrt*. 1994, 81. Chapter 8 specifically prescribes which information has to be recorded in the ship registry.

d) Dutch Code of International Private Law[19]

The Dutch Code of International Private Law, as entered into force in 2012, is relevant in this research as it provides conflict-of-law rules as to the existence and ranking of foreign maritime claims in the payout phase.[20] The conflict-of-law rules applicable to rights *in rem* on ships as set forth in book 10 might also play a role when the acquisition or the loss of rights *in rem* following a foreign judicial sale are questioned in the Netherlands. Book 10, however, does not regulate the recognition and enforcement of foreign judgments.[21]

3. Court System

The Dutch judicial system is laid out in the Law on Judicial Organisation of 1827,[22] which has been reformed considerably over the years.[23] There are three different courts in the Netherlands: The district court, the court of appeal and the supreme court.[24] Assuming the creditor does not have a (recognised) enforceable title, the district court is the court competent to adjudicate the case and deliver an enforceable title on the basis of which a judicial sale procedure can be initiated.[25] The Dutch court of appeal *(Gerechtshof)* is held competent to hear cases decided by the

[19] Wet van 19 mei 2011 tot vaststelling en invoering van boek 10 (internationaal privaatrecht) van het burgerlijk wetboek, *Stb*. 2011, 272. Hereinafter referred to as DCC book 10.

[20] DCC book 10, art. 160.

[21] See infra on enforceable titles and recognition; the law on the recognition and enforcement of foreign judgments is largely established by case law.

[22] Wet van den 18den April 1827, op de zamenstelling der Regterlijke magt en het beleid der Justitie, *Stb*. 20. Hereinafter referred to as 'Law On Judicial Organisation'.

[23] J.W.P. Verheugt, *Inleiding in het Nederlandse Recht* [Den Haag, 2003] 55.

[24] Law on Judicial Organisation, art 2.

[25] The court is competent if the Dutch judge has jurisdiction to decide on the merits of the case. According to the 1952 Arrest Convention, "the court of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits if the domestic law of the country in which the arrest is made gives jurisdiction to such Courts, or in any of the following cases namely: (a) if the claimant has his habitual residence or principal place of business in the country in which the arrest was made; (b) if the claim arose in the country in which the arrest was made; (c) if the claim concerns the voyage of the ship during which the arrest was made; (d) if the claim arose out of a collision or in circumstances covered by art. 13 of the International Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels, signed on 23rd September 1910; (e) if the claim is for salvage (f) if the claim is upon a mortgage or hypothecation of the ship arrested"; The court can also have jurisdiction to decide on the merits on the basis of, for example, a jurisdiction clause. See therefore W. Tetley, 'Jurisdiction Clauses and Forum non Conveniens in the Carriage of Goods by Sea', in M. Davies (ed.), *Jurisdiction and Forum Selection in International Maritime Law* [The Hague, 2005]183, 197–198 and F. Sparka, *Jurisdiction and Arbitration Clauses in Maritime Transport Documents* [Heidelberg, 2010].

district court against which a party has appealed.[26] The supreme court *(Hoge Raad der Nederlanden)* is the highest instance court in the Kingdom of the Netherlands. This court is competent to overrule decisions rendered by appellate courts on the basis of a lack of sufficient reasoning or an incorrect application of the law, but it does not reconsider the facts of the case.[27] In urgent cases where the parties require immediate relief, the preliminary relief judge of the district court can resolve the case in interlocutory proceedings and make the decision provisionally enforceable.[28]

The district court is competent to order the bailiff to have a ship arrested in execution of a judgment.[29] Which of the 11[30] district courts will be held competent to order such arrest is not entirely clear under Dutch procedural law.[31] There is in fact no explicit provision on territorial jurisdiction in Dutch law that requires the ship to lie within the district court's area of competence in order for the court to be competent to order an executory arrest.[32] However, in practice, the court in whose area of competence the ship is lying is usually also competent to order the executory arrest.[33] Nonetheless, the court's bailiff is not competent to arrest a ship in execution of a judgment that is located beyond the low waterline seawards.[34] A ship that is passing through the competent area of the court can however be arrested.[35]

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[26] Law on Judicial Organisation, art 60. There are five district courts in the Netherlands located in Amsterdam, Arnhem, 's- Gravenhage, 's-Hertogenbosch and Leeuwarden.

[27] Law on Judicial Organisation, arts 72–83.

[28] The decision is binding on all parties but is not final (and is therefore provisional) since parties in the interlocutory proceedings have the right to start proceedings on the merits of the case, which could be decided differently than what is decided in interlocutory proceedings. The decision taken in interlocutory proceedings will thus not affect the decision on the merits. See DCCP, art. 257. Note that appeal against the decision can be lodged with the court of appeal by means of a petition within four weeks of the date of the provisional decision. The procedure will continue to take place in the interlocutory framework. DCCP, art. 339 lid 2.

[29] DCCP, art. 563. The district court will be competent on the condition that the enforcing creditor did not choose to conduct the sale before a civil law notary.

[30] Besluit van 27 November 2012, houdende aanwijzing van zittingsplaatsen van rechtbanken en gerechtshoven, *Stb*. 2012, 601, art. 1.

[31] Law on Judicial Organisation, art 42.

[32] In the case of a conservatory arrest, DCCP art. 728 gives competence to the court in which the ship is expected or is located. As in most cases, a conservatory arrest will be followed by execution; the court where the ship is located will be competent.

[33] W. Verhoeven, *Ships: Arrests; Registration and Mortgages; Enforced Sales in the Netherlands* [Rotterdam, 1995] 48.

[34] DCCP, art 564 para 1 and 2. See also A.I.M van Mierlo, C.J.J.C van Nispen et al., *Burgerlijke Rechtsvordering, Tekst & Commentaar* [Deventer, 2008] 896. Even in the event the ship is located before the coast of Hoek van Holland, there is no possibility of conducting an executory arrest as this area is located beyond the area of competence of any judge. See on this pres. Rotterdam 28 October, *KG* 1994, p 442.

[35] Ships on their way to Antwerp could thus be arrested in Flushing. However, since the arrest is done physically, the bailiff will need cooperation from the master or the pilot to allow him to board the moving ship.

In principle, a judicial sale of a *Dutch* or *foreign* registered ship is conducted before a civil law notary, who is a public officer appointed by the state.[36] A judicial sale of a *foreign* ship can however also be conducted before the district court where the ship has been arrested.[37] In practice, the sale of a foreign ship by a court is usually preferred over a notary, so as to make the process of sale more transparent for foreign jurisdictions.[38] The procedure, formalities and the effects of a judicial sale before a notary are nonetheless the same as when it takes place before a court.[39]

There is no specific law in the Netherlands regarding the use of languages in court cases. Although the working language of courts in the Netherlands is in principle Dutch,[40] judges tend to have a rather pragmatic approach towards the use of other languages.[41] The high court of the Netherlands ruled in several cases that court decisions or judicial documents (partly) written in another language are considered to be valid as long as the document is comprehensible for the parties and the court in the case.[42] The decisive criterion for allowing a foreign language to enter into the court's rulings or procedural documents is thus that the decision and documents in question are sufficiently understandable for the parties and the court. During the latest parliamentary discussions concerning the use of languages in court, the legislator acknowledged the specific need to accept English in maritime related cases.[43] No doubt owing to the transnational character of the shipping sector, the legislator has, among other things, suggested creating a legal basis that specifically permits the use of English in cases related to highly international sectors such as shipping and aviation.[44] Notwithstanding the fact that this legal basis does not yet exist, it is likely that courts in the Netherlands will accept procedural documents written in English.

During the course of a judicial sale of a ship, communication between the court and the parties involved is essential. As will be evidenced in the following chapters, Dutch law at some occasions requires that certain documents such as the command for payment, warrant of arrest and the abstract of the sale are served on f.e. the debtor of the claim(s) or the ship-owner. When the documents have to be served on

[36] DCCP, art. 575.

[37] Ibid., art 570.1 juncto 575.

[38] A.I.M van Mierlo & C.J.J.C van Nispen et al., *Burgerlijke Rechtsvordering, Tekst & Commentaar* [Deventer, 2008] 896.

[39] DCCP, art. 578.

[40] In courts in Friesland, the Frisian language is also allowed for oral statements and case files.

[41] College can Beroep voor het bedrijfsleven 19 January 2009, nr. BH0436 available at www.rechtspraak.nl (last visited on 21.07.14).

[42] HR 17 June 1997, *NJ* 1997, 658. HR 19 January 1993, *NJ* 1993, 513. Also lower courts take a pragmatic approach towards the use of other languages. See Kantonrechter Haarlem 3 July 2008, nr. 381173/CV EXPL 08-2887 available at www.rechtspraak.nl (last visited on 21.07.14). See also T. Sterk, *De taal van het process. Mag het ook een ander zijn?* [Antwerp, 2001] 10–12.

[43] The debate was held in the framework of an amendment to the Dutch constitution on the mandatory use of Dutch in courts. Kamerstukken II 2010–2011, nr. 32.522, nr 3, p 4.

[44] Kamerstukken II 2010–2011, nr. 32.522, nr 3, p 4.

persons within the Netherlands, documents are considered to be served if the writ is furnished by the bailiff to the person on whom the document should be served.[45] When it comes to legal persons, documents are deemed to be served where a writ is handed to a person or entity which represents the legal person.[46] When a person refuses to accept the writ for some reason, the bailiff will record this refusal in which case the writ is deemed to have been served on the person in question.[47] When the bailiff is unable to locate the addressee and if there is nobody in the building who could serve the document in his name i.e. a family member or someone else living at the house,[48] the document is considered to be served if the bailiff has left a copy of the document in a sealed envelope indicating the full name and address of the addressee.[49]

In the case the person or entity on which the document should be served has no known address in the Netherlands, but does have one abroad a distinction should be made between a person residing in 1) a state to which the EU Service Regulation is applicable or 2) a state party to the 1965 The Hague Service Convention or 3) in another state. This section is only concerned with the service in another state.[50] In that case, Dutch law requires the bailiff to serve the writ on the office of the public prosecutor of the competent court. The public prosecutor will then send a copy of the writ to the Ministry of Foreign Affairs which notifies the defendant through diplomatic or consular channels.[51] Additionally, the bailiff has to send per registered post a transcript of the document that has to be served to the addressee's registered or habitual residence outside the Netherlands. When the person or entity on which the document should be served has no known address, the mere fact of handing the copy to the public prosecutor competent for the geographical area will constitute service.[52]

When it comes to judicial sales of ships, Dutch law prescribes in some cases that documents can be directly served on the master or crew present on the ship.[53] Since the service of documents is a procedural matter, the *lex fori* will be applicable to determine whether a master or crew member has the authorisation to represent and act on behalf of the shipping company.[54] This implies that, in accordance with the DCCP, service on the master can take place, even if the master has no powers of attorney under the foreign law of the flag.

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[45] DCCP, art. 46.1.

[46] Ibid., art. 50.

[47] Ibid., art. 46.3.

[48] Ibid., art. 57.1.

[49] Ibid., art. 46–47.

[50] See Chapter 2 for service under the EU Service Regulation and the 1965 The Hague Service Convention.

[51] DCCP, art. 55.1.

[52] Ibid., art. 54 para 2 & 4.

[53] See for example DCCP, art. 565 para 4 juncto Book 8, art. 260.

[54] Book 10, art. 3.

II. Requirements for a Judicial Sale

Although Dutch law does not specifically list the requirements necessary to initiate a judicial sale, from the relevant provisions on the matter it can be derived that some preconditions must be fulfilled before a judicial sale procedure can be initiated: In the first place, the provisions on judicial sales of ships are only applicable to *ships* as defined by the *lex registrationis*.[55] Secondly, the DCCP requires the enforcing claimant to hold an *enforceable title*[56] in order to be able to place the ship under *executory arrest*, and it is this latter condition that constitutes the third requirement for initiating a judicial sale.[57]

1. Asset Constitutes a 'Ship'

The Dutch procedural code explicitly includes the definition of a Dutch ship in book 8.[58] In addition, the code makes the provisions concerning executory arrest and judicial sale applicable also to ships under construction.[59] The provisions on executory ship arrest and judicial sales of ships as laid down in the procedural code are thus applicable to "all things, other than aircraft, which, according to their construction are destined to float and which float or have done so",[60] including those things which are still under construction in order to be able to float in the future.[61] The drafters of book 8 defined a Dutch ship as uncomplicatedly as possible so as to avoid an overly narrow interpretation. Namely, the term "floating" was used over the term "navigating" for the reason that "floating is a fixed unambiguous physical concept."[62] Implementing the term "navigating" could be interpreted as suggesting that a human intervention is needed. Furthermore, the use of the word "construction" in the definition was preferred over the word "building", so as to exclude those objects that underwent changes enabling them to float after they were initially built.[63] Due to the rather broad definition of a ship in Dutch law, many

[55] See infra for definition of a Dutch ship.

[56] Ibid., art. 563 and DCCP, art. 430.

[57] DCC, book 10, art. 3.

[58] DCCP, art. 562a juncto DCC, book 8, art. 1 para 1.

[59] Ibid., art. 562a.

[60] DCC, book 8, art. 1 para 1.

[61] DCCP, art. 562 a.

[62] R.E. Japiske, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht (Asser-Series), Verkeersmiddelen en vervoer, Deel I Algemene bepalingen en rederij, Part 7-1* [Deventer, 2004] 2.

[63] Ibid, p 2.

objects fall within this definition. Objects such as surfboards, dredgers, plastic ducks and shipwrecks on the bottom of the ocean are considered to be ships.[64]

A ship, moreover, includes all ship components that are built into the ship and intended to stay attached to it, such as propeller equipment or other machinery.[65] Components become a part of the ship, and thus fall under the ownership of the ship-owner, due to accession.[66] Even when the component is temporarily removed from the ship, it is still considered to be part of the ship.[67] Creditors will in that case still have a right to enforce their claim against the ship, including the temporarily removed components. Ship appurtenances are also considered to be part of the ship, unless the law states differently.[68] The law describes appurtenances as objects, not falling under the heading of ship components that are destined to serve the ship and are recognisable by a form serving that end, including navigational and communicational equipment that is connected to the ship in such manner that it can be separated from the ship without damaging the ship extensively.[69] Ship appurtenances can have a different owner from the individual (or entity) owning the ship.[70] However, when a certain ship appurtenance stops serving the ship, it is not an appurtenance anymore in the sense of article 1 para 4 and is therefore not a part of the ship against which creditors can enforce their claim. This distinction between ship components and ship appurtenances is relevant in those cases when the owner of the ship is not the same owner as the one of the appurtenance or the ship component in question. The components are, due to incorporation, part of the ship, therefore falling under the ownership of the ship-owner.[71] Conversely, appurtenances that are not owned by the ship-owner can, on the ground of retention or a rental contract, be kept separated from the ship, so creditors cannot enforce their claims against these assets.

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[64] Ibid., p 10–11.

[65] DCC, book 8, art. 1 para 3. Other machinery can be air conditioning, cooling and heating installations and generators. See R.E. Japiske, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht (Asser-Series), Verkeersmiddelen en vervoer, Deel I Algemene bepalingen en rederij, Part 7-1* [Deventer, 2004] 17.

[66] DCC, book 5, art 3 and 14.

[67] M.H. Claringbould, *Parlementaire geschiedenis van het nieuwe Burgerlijk Wetboek* [Deventer, 1992] 33.

[68] DCC, book 8, art 1 para 5.

[69] Ibid., art 1 para 4.

[70] R.E. Japiske, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht (Asser-Series), Verkeersmiddelen en vervoer, Deel I Algemene bepalingen en rederij, Part 7-1* [Deventer, 2004] 17.

[71] DCC, book 5, art. 3 and 14.

In book 8 a distinction is also made between seagoing ships[72] and inland waterway ships.[73] The distinction between inland and seagoing ships is significant as in certain phases of the execution different rules will apply to the two types of ships.[74] This research is however restricted to a study of the judicial sale of seagoing ships.[75]

According to Dutch procedural law, "goods destined to be used in public service" are immune from conservatory arrest or an arrest in execution.[76] The use of the term "public service", results in the fact that the immunity is only granted to ships that are used to serve a *general interest,* even if the activity has a commercial character.[77] For this reason, state-owned ships that are involved in activities that do not serve the public interest are excluded from the rules related to the immunity from conservatory arrest or an arrest in execution. In line with the 1926 International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships and the 1934 Additional Protocol to which the Netherlands is a party, the immunity is granted to war ships, state owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships, etc…, unless the claims arise in respect of collision or accidents of navigation, salvage, general average, repairs, supplies or other contracts relating to the ship, in which case the state is not entitled to rely upon any immunity from execution.[78]

[72] DCC, book 8, art. 2 para 1. Seagoing ships are those ships that are registered in a public registry of seagoing ships, as referred to in arts. 16–31 of book 3 of the Dutch Civil Code, as well as ships which are not registered in these Dutch public registries but which are according to their construction exclusively or principally destined to float at sea.

[73] DCC, book 8, art. 3 para 1. Inland navigation ships only include those ships which are registered as inland waterway ships or ships which, if not registered in the Dutch registry, are according to their construction neither exclusively nor principally destined to float.

[74] Laws applicable to seagoing ships or inland waterway ships differ from each other in the areas of mortgages and liens, collisions, limitation of liability rules, general average, etc.

[75] See supra: Chapter 1, introduction C) scope.

[76] DCCP, art. 436 and 703.

[77] This is confirmed by case law on the matter: See for example HR 11 juli 2008, NJ 2010, 525, para 3.5 and conclusion of Parket bij HR, RvdW 2008, 728, para 14. Hof 's-Gravenhage 28 november 1968, *NJ* 1969, 484; HR 26 oktober 1973, *NJ* 1974, 361 nt. Van Panhuys; HR 28 mei 1993, *NJ* 1994, 329 nt. JCS. See also conclusion A-G 15 and 16 in HR 28 mei 1993, *NJ* 1994, 329 nt. JCS.

[78] Verdrag tot het vaststellen van enige eenvormige regelen betreffende de immuniteit van staatsschepen and Aanvullend Protocol van 1934 bij het Verdrag tot het vaststellen van enige eenvormige regelen betreffende de immuniteit van staatsschepen, *Stb*. 1936, 98. Since state-owned non-commercially exploited ships are outside the scope of this research, this treaty will not be further addressed.

2. Enforceable Title

As a general rule, the enforcing creditor must be in the possession of an enforceable title before a judicial sale can be initiated.[79] Enforceable titles under Dutch law include all judicial decisions rendered by a Dutch court and all Dutch authentic acts that bear the executory formula. The time necessary to obtain an enforceable title in the Netherlands varies—of course—from case to case. If however the creditor has a Dutch mortgage in an enforceable format, no separate enforceable title is required to initiate a judicial sale.[80] In that case, no arrest has to be made prior to the sale, and the ship can be sold even when it is not located on Dutch territory.[81]

An enforceable title given by a foreign court is in principle not enforceable within the Netherlands.[82] The court will thus, at least in theory, have to decide on the matter again. In practice, the court will however decide within the borders of the Dutch principles of public policy whether or not to enforce the judgment.[83] When the judgment (or act) is in line with what is proper under common international private law,[84] the judge will likely not again decide the case on the merits.[85] Exceptions to the general rule on the non-enforceability of foreign judgments and authentic acts can only be based on the grounds of a (bilateral)[86] treaty, by law[87] or on the basis of EU laws.[88] If such an inter-state agreement exists, the enforcing creditor can request the Dutch court to start exequatur procedures.[89] Permission to enforce the foreign title is requested by means of a petition accompanied by an authentic copy of the foreign decision and proof that the decision is executable in

[79] DCCP, art. 430.

[80] W. Jarigsma, 'the Netherlands' in C. Breitzke & J. Lux et. al. (eds), *Maritime Law Handbook* [London, 1998] Suppl. 6, part III, p 3.

[81] This is, in principle, not applicable to foreign mortgages.

[82] DCCP, art. 431 para 1. Note that this article is only addressing the enforceability of a foreign decision and does not interfere with the ability to recognize foreign judgments: see on this point infra on the recognition of foreign judicial sales.

[83] See milestone decision HR 14 November 1924, *NJ* 1925, 91 that was followed in other decisions such as HR 26 September 2014, NJB 2014/1778, HR 17 December 1993, *NJ* 1994/348, HR 17 December 1993, *NJ* 1994/350.

[84] Principles such as due process might play a role in how far the judge will reconsider the matter. Also, the Dutch judge will assess the grounds from which the foreign judge derived his jurisdiction. See for example HR 17 December 1993, *NJ* 1994/348 & 350.

[85] *De facto* the judge carries out an exequatur procedure.

[86] Some Bilateral treaties on the enforcement of foreign titles became irrelevant because EU law. The Dutch–Belgian execution treaty of 28 March 1925, *Stn*. 1928, p 405 is an example of a treaty which became irrelevant due to EU law.

[87] Foreign arbitral awards can be enforced even if there is no treaty or EU regulation applicable. DCCP, art. 1076 para 1. This is at odds with the legal impossibility of enforcing foreign judgments.

[88] DCCP, art. 431 *juncto* arts. 985–994.

[89] Ibid., art. 985–992. Under the Brussels-I Recast exequatur proceedings are abolished. See Chapter 2.

this foreign state.[90] The court gives permission to enforce the sale after examining whether there is indeed a legal ground—i.e. a law or a treaty—on the basis of which the title becomes executable in the Netherlands.[91] The judge will thus not review the case on the merits.

Under general Dutch law, the debtor is responsible with all his assets for claims against him.[92] If the creditor wants to seize the ship, the enforceable title should therefore be, according to this general rule, against the owner of the ship. However, in the case of a *conservatory* arrest of a ship, the law allows an arrest of the ship even if the registered owner is not personally liable for the claim on the condition that the claim is secured by a lien, a mortgage or some other privilege which, in each respective case, is recognised under Dutch law.[93] Literature on the matter clarifies that both conservatory and executory arrest are possible on the same grounds, meaning that all conservatory arrests can be converted into executory arrests.[94] As affirmed by case law, a ship can only be arrested in respect of a claim against a time or voyage charterer if either the owner is personally jointly liable alongside the charterer or if the creditor has a lien on the ship under Dutch law.[95] Arresting a ship and, consequently, having a ship judicially sold is thus not possible under Dutch law when only a time or voyage charterer is liable for the claim.[96]

Once the enforceable title is obtained, it will have to be served on the debtor against whom the execution will take place.[97] When there is an imminent danger that the ship will leave the Dutch jurisdiction, the judge of provisional measures can, on the request of the bailiff, allow the enforcing creditor to have the enforceable title served together with the order of executory arrest.[98] In accordance with the general rules on litigation, the writ of execution has to be provided to the debtor himself or delivered to his domicile.[99] The writ includes the date when it was served, the name of the individual or name of the company requesting service, the name and address of the bailiff, the name and address of the debtor, and if applicable the name of the person to whom the writ is given.

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[90] Ibid., art. 986.

[91] H.G., Punt, *Memo Beslagrecht*, Kluwer, 2012, p 451.

[92] DCC, book 3, art. 276.

[93] Ibid., book 8, arts. 216 & 217, para 3 & 215 para 1.

[94] M.H. Claringbold, 'Over voorrechten en verhaalbaarheid' in: T. Willink (ed.), *Vergelijkend zeerecht. Een bundeling van ter ere van Prof. Mr. R.E. Japiske op 18 februari 1994 gehouden voordrachten* [Zwolle, 1994] 93–113, 103 & 107.

[95] HR 9 December 2011, *ETL* 2012, 24.

[96] The impossibility of arresting a ship on the basis of the claim on a time or voyage charterer is derived from an interpretation of the 1952 Arrest Convention, art. 3 para 4, second sentence. Although this sentence creates the possibility of arresting a person other than the 'registered owner', the art. was only intended to be applicable to the 'reeder', i.e. the person who appointed the master, and to a time or voyage charterer. See in this regard conclusie Procureur-Generaal, S&S, 2012, p 24 bij HR 9 December 2011, *ETL* 2012, 24, para 23–24. See also F. Berlingieri, *Arrest of Ships. A Commentary on the 1952 and 1999 Arrest Conventions* [London, 2006] 4.

[97] DCCP, art. 563 para 1.

[98] Ibid., art. 563 para 2.

[99] Ibid., art. 46.1.

3. Ship Under Executory Arrest

Besides the need for an enforceable title, the Dutch procedural rules require the ship to be under executory arrest on Dutch territory before the actual sale can take place.[100] Two situations can be the starting point when determining how to proceed to an executory arrest: (a) the relevant ship was not yet under conservatory arrest when the enforceable title was obtained or (b) the ship was already under conservatory arrest in the Netherlands once the enforceable title is obtained.

a) Ship Was *Not* Under Conservatory Arrest

Assuming that the ship was not under conservatory arrest when a valid enforceable title was obtained, the debtor has to be served[101] with the command of payment and ultimately, if no payment is obtained, the warrant of arrest.

(1) Command for Payment & Service

Unless a command of payment is included in the enforceable title, a separate command of payment shall be served on the debtor before an arrest can take place.[102] The command for payment allows the debtor to satisfy his debts within a time-frame of 24 h before the arrest can take place.[103] As an exception to the 24-h rule, the provisional measures judge can allow the arrest to be performed without prior command of payment when there is a reasonable fear that the ship will leave the jurisdiction.[104] In that case the executory title and the warrant for arrest are served at the same time.[105] The command of payment has to be served on the owner or the accountant,[106] at their home address or in person.[107]

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[100] Ibid., arts. 553–570.

[101] When documents have to be served abroad, the court should certainly take into consideration the applicable EU or international treaties. See Chapter 2.

[102] DCCP, art. 563.

[103] Ibid., art 563 para 1. If the arrest is performed before the 24 hours have passed, the arrest is considered to be void if there is an unreasonable disadvantage for the receiver of the command.

[104] DCCP, art. 563 paras 2 and 3.

[105] A.I.M van Mierlo & C.J.J.C van Nispen et al., *Burgerlijke Rechtsvordering, Tekst & Commentaar* [Deventer, 2008] 884.

[106] DCCP, art. 565 para 3 juncto book 8, art 8:178. In case the ship was registered in the Dutch registry and the competency of the accountant has been explicitly limited in the Dutch Trade Register, the command of payment cannot be served on the accountant (book 8, art. 178 para 2). If the ship is registered abroad, documents can be served on the accountant, unless limitations are known. (art. 178 para 2).

[107] DCCP, art. 563 para 1. For more on how the service is completed see this Chapter on domestic legal sources -> court system.

(2) Warrant for Arrest

After the serving of the command[108] and upon the debt not having been satisfied, the bailiff will organise the executory arrest of the ship. The bailiff, often accompanied by a witness, completes the arrest on board the ship itself.[109]

Besides the general content of each warrant,[110] the warrant for arrest has to include the name and domicile of the executor, the executory title, the amount of money due on the basis of the executory title, the name and description of the ship and its appurtenances, the name of the owner of the ship or the accountant, and if the debtor is not the owner, also the debtor's name shall be included.[111]

The warrant for arrest has to be served on the owner of the ship or, in the case of a shipping company, on the accountant of the shipping company.[112] When the owner or the accountant is not known or is based abroad, the writ can also be served on the master or skipper.[113] If the owner is not the debtor,[114] then the debtor has to sign the warrant as well.[115] Moreover, the writ of execution has to be served on the registered mortgagees within 4 days after the registration of the writ of execution.[116]

The warrant for arrest has to be inscribed in the Dutch registry in the event the arrested ship is registered there.[117] Claims arising out of contracts concluded after the registration of the warrant—or after the warrant was served in the case of a foreign ship[118]—cannot be directed at the executor.[119]

The master of the ship continues in principle to be responsible for the ship during its arrest, unless a custodian is appointed.[120] There is no obligation on behalf of the bailiff or enforcing creditor to take custody over the ship when it has been arrested. In practice, the enforcing creditor will usually, in agreement with the owner or

[108] No service of command is necessary when the judge gives approval to serve the warrant and the executory title at the same time. DCCP, art. 563 para 3.

[109] DCCP, art. 564 para 1.

[110] Ibid., art. 45. The warrant has to include, for example, the date it was served, the name and office of the bailiff, the costs of the warrant and a description of the object under executory arrest.

[111] DCCP, art. 565 para 1.

[112] Ibid., art. 565 para 3 juncto book 8, art 8:178. The warrant for arrest can be served on the accountant and not a board member, since most shipping companies do not have a board.

[113] DCCP, art. 565 para 4.

[114] A situation generally encountered when the debtor is a bareboat charterer.

[115] DCCP, art. 565 para 3.

[116] Ibid., art. 568 juncto art. 508.

[117] Ibid., art. 566 para 1. The registration is on the basis of art. 8 Kadasterwet.

[118] DCCP, art. 567.

[119] Ibid., art. 566 para 2.

[120] W. Jarigsma, 'the Netherlands' in C. Breitzke & J. Lux et. al. (eds), *Maritime Law Handbook* [London, 1998] Suppl. 6, part III, 5.

master of the ship, appoint a custodian, who is in fact often the master of the ship.[121] Alternatively, there is also a possibility for the bailiff, on the request of the arresting creditor, to assume responsibility for appointing the custodian.[122] Notwithstanding the fact that there is no obligation for the custodian to remain on board the ship, he bears responsibility over the ship taken under his custody.[123] The enforcing creditor can moreover be held liable for the wrongful actions or negligent behaviour of the custodian. As an alternative for preventing the ship from fleeing, the bailiff can, for example, also remove an essential part of the engine or inform the harbour authority that a particular ship is arrested and that it should remain in the port area.[124] The costs resulting from actions taken to prevent the ship from fleeing enjoy high priority in the priority contest on the sale proceeds.[125]

When the ship is registered in the Netherlands and when multiple creditors have arrested the ship, the earliest arrestor will be the one taking the initiative to start judicial sale proceedings.[126] The registered mortgage holder can nonetheless become the enforcing party instead of the first arrestor if he informs the original executor within 14 days after the writ has been served on him that he will take over the execution process.[127] In the case that there are several mortgagees, the mortgage holder who is ranked higher has the right to take over the execution.[128]

b) Ship Was Under Conservatory Arrest

A conservatory arrest is converted into an executory arrest from the moment the arresting party has obtained an executory title, which is consequently served on the relevant parties.[129] Naturally, the arrest has to be lifted when no enforceable title has been obtained out of the judgment *res judicata*.[130]

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[121] DCCP, art. 564 para 3. A.I.M van Mierlo & C.J.J.C van Nispen et al., *Burgerlijke Rechtsvordering, Tekst & Commentaar* [Deventer, 2008], 885.

[122] DCCP, art. 564 para 3.

[123] W. Jarigsma, 'the Netherlands' in C. Breitzke & J. Lux et. al. (eds), *Maritime Law Handbook* [London, 1998] Suppl. 6, part III, p 5.

[124] A.I.M van Mierlo & C.J.J.C van Nispen et al., *Burgerlijke Rechtsvordering, Tekst & Commentaar* [Deventer, 2008] 885.

[125] DCC, book 8, art. 211 (a) for seagoing ships.

[126] DCCP, art. 569, para 1.

[127] Ibid., art. 568 juncto art. 509.

[128] Ibid., art. 568 juncto 509 para 2.

[129] Ibid., art. 704 para 1.

[130] DCCP, art. 704 para 2. The arrest is lifted only in the event the decision is no longer capable of being imposed.

III. Preparations for the Sale

1. Notary or District Court

In principle, a judicial sale of a *Dutch* or *foreign* registered ship takes place before a civil law notary, who is a public officer appointed by the state.[131] The civil law notary is appointed in the warrant of arrest and is usually located within the same arrondissement as where the ship is arrested.[132] A judicial sale on a *foreign* ship can however also be conducted before the district court in a public hearing, on the request of the executing creditor.[133] The legal representative of the enforcing creditor organises the sale entirely, whereas the court supervises the sale and safeguards that all procedural rules are complied with.[134]

2. Conditions of Sale and Advertisement of Sale

A sale before a court or before a notary shall always be advertised sufficiently, before the sale takes place.[135] The advertisement will at a minimum include the name of the notary or judge before whom the sale will take place, the name and address of the executor, the executory title, the underlying monetary claim, the name of the known ship-owner as well as the debtor when the owner is not the debtor, the name of the ship, the location of the ship, and details where and when the sale will take place.[136] In addition to the advertisement, notices of sale are posted at the place where the ship will be sold and where the arrested ship is berthed.[137] The conditions of sale usually include information on whether the ship is sold free and clear of all encumbrances,[138] when the purchase price is due, whether there is a minimum price for the ship and, if so, what this price is, what the currency of the auction is, whether the ship is sold "as is where is", the amount of security that the executor has to pay, etc. There is no prior valuation of the ship by the court or notary prior to the sale nor is the court required to set a minimum price. Potential buyers can always inspect the ship and its certificates.

Besides these general requirements—applicable both to a sale before a notary and a court—some formalities applicable to either a sale before a court or a sale

[131] DCCP, art. 575.

[132] H.G. Punt, *Memo Beslagrecht* (Deventer, 2012) 402.

[133] DCCP, art 570.1 juncto 575.

[134] W. Jarigsma, 'the Netherlands' in C. Breitzke & J. Lux et. al. (eds), *Maritime Law Handbook* [London, 1998] Suppl. 6, part III, p 6.

[135] DCCP, art. 571.

[136] Ibid., art. 572.

[137] W. Jarigsma, Maritime Law Handbook, ed. C., BREITZKE, Suppl. 35 part III, 2009, p 7.

[138] DCCP, art. 570 juncto 517 para 2.

before the civil law notary will have to be met. When the sale takes place before a civil law notary, the latter has to determine the place and time of the sale within 14 days of his appointment.[139] The attorney of the enforcing party drafts the conditions of sale and the competent notary approves these conditions. The notary has to inform the known creditors about the conditions of sale at least 8 days before the sale takes place.[140] The notary should also have a copy of the conditions available for interested parties at his office.[141] In the case of a sale of ship before a notary, the sale should be made public at least 14 days before the judicial sale takes place in order to attract sufficient potential buyers.[142] The sale should, moreover, be published according to the customs of the region where the ship was arrested. This can be in a known newspaper, website and/or other places where potential buyers are found. If the ship is registered abroad, the provisional measures judge can designate, either on the request of the notary before whom the sale takes place or on the request of the executor, the newspaper(s) of the state of registry in which the sale has to be published.[143] The provisional measures judge can in that case also decide to increase the usual time of 14 days between the publication of the sale and the sale itself.[144] When the executor of a foreign registered ship decides to have the ship sold by the district court in a public hearing, the executor has to request the court to set a date for the judicial sale[145] The judge has to take into consideration a time frame of at least 30 days starting from the moment the executing creditor files the conditions of sale. Also, before the judge can set a date on which the sale should take place, the judge has to receive a declaration of the bailiff that there was sufficient and valid advertisement of the sale in accordance with the formalities set out in the DCCP[146] and, additionally, the lawyer of the executor must prepare and file a list of all the known rightful claimants and arrestors.[147] The executor shall personally inform the rightful claimants about the sale.[148] At least 3 days before the sale takes place, the judge will give an estimate of the costs of the sale.[149]

The preparation of a sale of foreign seagoing ships with less than 20 m^3 gross volume and less than 6 m^3 gross tonnages will be subjected to the same rules

[139] DCCP, art. 570 juncto 570 juncto art. 515. The notary is appointed on the basis of art. 514 para 2.
[140] DCCP, art. 570 juncto 517 para 1.
[141] Ibid., art. 570 juncto 517 para 1.
[142] Ibid., art. 571 para 1.
[143] Ibid., art. 571 para 2.
[144] Ibid., art. 571 para 3.
[145] Ibid., art. 575.
[146] Ibid. art. 571.
[147] Ibid., 575 para 2.
[148] Ibid., art. 575 para 3.
[149] Ibid., art. 575 para 4.

applicable to movable property[150]: In this case the judicial sale can only take place 4 weeks after the debtor served the executory title.[151] This period can be shortened when the relevant parties have agreed on such a modification or in the case the party seeking expedited procedure the permission of the provisional measures judge.[152] The method of publication is the same as the one used for foreign ships.[153]

3. Disputes and Claims for Dissolution

If there is any dispute about the conditions, date, place, etc. of the judicial sale, the interested parties can submit the issue before the provisional measures judge.[154] The decision of the provisional measures judge regarding these matters cannot be appealed.[155]

Since the judge is, as a general rule, always bound by the decision on the merits, he can only stop the execution on the basis of valid grounds. When, for example, the judgment on the merits is based on an evident legal or factual error or if new facts have arisen that put the debtor in a state of emergency, the judge cannot proceed with the immediate execution[156] and will await the appeal on the merits of the case.

IV. The Judicial Sale

The judicial sale before a civil law notary or a court takes place at a public hearing held in the Dutch language.[157] The first part of the sale procedure is conducted by advanced bidding, during which the potential buyers can tender their increasingly higher bids.[158] When a maximum bid is attained, a small break will take place after which the second part of the sale will commence. In this part, the sale is continued, this time by the method of downwards bidding.[159] The judge or notary will set a certain purchase price, lying higher than the highest bid from the first round, after which he gradually reduces the price of the ship until someone says “mine” or until

[150] Ibid., art. 576.
[151] Ibid. art. 576 para 1 juncto art. 462 para 1.
[152] Ibid., art. 576 para 1 juncto art. 462 para 2.
[153] Ibid. art. 571.
[154] Ibid. art. 570 para 2 juncto arts. 518 and 575 para 5 juncto 518.
[155] Ibid. art. 518.
[156] HR 22 April 1983, *NJ* 1984, 145.
[157] DCCP, art. 570 para 1 and 575 para 1.
[158] Ibid., art. 519.
[159] Ibid., art. 519.

the amount of the highest bid of the first round was reached.[160] The sale is consequently affirmed at the price at which someone expressed the word "mine". When the downwards bidding process does not attract other buyers, the person having the highest bid in the first round is the buyer of the ship. The sale is final and not subject to appeal.[161] The notary or judge before whom the sale takes place has to inform, in writing, the debtor and the creditors or other claimants about the outcome of the sale.[162] The price of the ship has to be deposited with the notary or clerk,[163] depending on whether the sale took place before a notary[164] or judge,[165] or it has to be paid to an appointed custodian.[166] If the buyer refuses to pay the purchase price within the time as indicated in the conditions of sale, the executor can sell the ship again at the expense of the defaulting buyer.[167] All aforementioned formalities should be met again in the event the ship is re-auctioned.[168] If the payment of the price of the ship is made within the time indicated in the conditions of sale, the buyer will receive a notarial deed of adjudication[169] or the judgment of sale with the minutes of adjudication.[170] These documents can be used to have the ship registered or deregistered in the (foreign) ship registry. By paying the purchase price, the ship is cleared from all existing claims and arrests if the conditions of sale do not indicate otherwise and, of course, if the foreign registry recognises the sale and the effects.[171] Furthermore, the estimated value of ship appurtenances that were sold together with the ship but owned by someone different from the ship-owner can be claimed back from the purchase price with priority over all other claims.[172]

[160] M. Claringbould, 'Arrest of ships in the Netherlands' in C. Hill, *Arrest of ships series* [London, 1986] 68.

[161] DCCP, art. 570 para 2 juncto arts. 518 and 575 para 6.

[162] Ibid., art. 570 para 2 juncto art. 525; for a sale before a court see art. 575 para 5 juncto 523.

[163] Where the ship was a foreign seagoing ship with less than twenty cubic meters gross volume and less than six cubic meters gross tonnage (art. 576), the sale has to take place before a bailiff. The sale price of the ship will have to be deposited with him.

[164] DCCP. art. 570.

[165] Ibid., art. 575.

[166] Ibid., art. 577 para 1.

[167] Ibid., art. 577 para 2. The sale will take place in accordance with DCCP art. 570.

[168] DCCP, art. 577 juncto art. 570.

[169] Ibid., art. 570 juncto art. 525.

[170] Ibid., art. 575.

[171] Ibid., art. 578 para 2.

[172] Ibid., art. 581 para 1.

V. Post-sale Phase

1. Appointment of Liquidator

After the execution, the provisional measures judge of the place where the ship is located is competent to appoint, on the request of the relevant creditors, an official receiver who will preside over the distribution of the proceeds.[173] The official receiver is an officer of the district court who acts as a liquidator. In practice, the location where the ship was sold and not the location of the ship after the sale will determine the competent provisional measures judge.[174]

The law clerk of the appointed liquidator will notify the relevant creditors about the appointment of the liquidator and advise them of the 2-week time limit in which they can state—in written form—their claims and the evidence thereof to the liquidator.[175] In their writing, they can as well propose an order of priority.[176] After the 2 weeks have elapsed, the liquidator will decide on a division of the funds[177] and informs the relevant claimants of the date on which they can object to the proposed order of priority.[178] If there is no objection, the funds will be paid accordingly. If there are objections and no agreement can be reached, the matter will be decided in a separate hearing.[179] The liquidation process ends when there are no pending objections and at that point the official receiver will order the custodian of the fund to distribute the amount according to the decided order of priority.[180]

2. Recognition and Ranking of Claims

In most cases, the fund formed in the court after the judicial sale will be insufficient to satisfy all claims. Therefore, a ranking of claims has to be established according to which parties will be paid out. This is often not an easy task, certainly considering that the liquidator has to take into account the various foreign rights and their scope. In fact, states differ greatly among each other in the concept of liens and their ranking. It might, for example, very well be that according to the *lex causae*[181] or

[173] Ibid., art. 552 para 1.
[174] H. Oudelaar, *Vademecum Burgerlijk Procesrecht – executie en beslag*, [Deventer, 2001] 469.
[175] DCCP, art. 552 para 1 juncto art. 482.
[176] Ibid., art. 552 para 1 juncto art. 482 para 2.
[177] Ibid., art. 552 para 1 juncto art. 483.
[178] Ibid. art. 552 para 1 juncto art. 484 para 1.
[179] Ibid. art. 552 para 1 juncto art. 486.
[180] Ibid. art. 552 para 1 juncto art. 485.
[181] The law governing the claim.

the *lex registrationis*[182] some claims enjoy priority while such advantageous status is not granted to the claim according to the *lex executionis*.[183]

According to Dutch international private law rules, the existence and the scope of claims has to be determined by the *lex causae*,[184] being the *lex contractus* in the case the claim is based on a contractual obligation[185] and the *lex loci delicti* when the claims result from extra-contractual obligations.[186]

The question of whether a claim is prioritised and what ranking it holds is, according to Dutch international private law, decided on the basis of the *lex registrationis*.[187] However, for the purpose of protecting the mortgage holder, Dutch law has inserted a limitation to the application of the *lex registrationis*: priority higher than the mortgage will be granted only if the claim in question is also prioritised as such under Dutch law.[188] Additionally, if the claim is not prioritised under the *lex causae* while it is under the *lex registrationis*, it will similarly not receive any priority.[189]

When Dutch law has been found applicable by a foreign court, the scope of the various rights according to Dutch law and their ranking becomes relevant. Moreover, the Dutch priority rules could also play a significant role in determining the priority status of a foreign lien. In what follows, this study will therefore have a closer look at the various claims and their position as to the distribution of sale proceeds in case the *lex fori* plays a role in determining the priority of claims.

a) Maritime Lien

In Dutch law, some particular claims are granted priority over all other claims. Generally, the law grants priority to those acts which were conducted for the benefit of all creditors. Accordingly, the costs related to the sale of ship are ranked first in line and will thus be paid out straight away from the sale fund.[190] These costs include all costs that are reasonably indispensable for fulfilling the sale of the ship,

[182] The law of the flag state.

[183] The law where the judicial sale of the ship takes place.

[184] DCC, book 10, art. 160 para 1.

[185] Book 10, art. 154 (law applicable to the contractual obligations). In case European Law is applicable, Rome I (Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations, *Official Journal of the European Union* No L177/6, 4/7/2008) will govern the existence of the claim. See book 10, art. 153.

[186] Book 10, art. 159 (law applicable to obligations resulting from tort). In case European Law is applicable, Rome II (Regulation No 864/2007 of the European Parliament and of the Council of 11 July 2007, *Official Journal of the European Union* No L199/40, 31/7/2007) will necessarily come into play. See book 10, art. 157.

[187] DCC, book 10, art. 160 paras 2 and 3.

[188] Ibid., art. 160 para 2. The Dutch priority rules are set out in DCC, book 8, arts. 210–219.

[189] Ibid., art. 160 para 3.

[190] DCC, book 8, art. 210 para 1.

ranging from bunkers and provisions for the crew. Besides this, also the additional costs the enforcing creditor incurred in order to enforce his claim form a first-priority charge. If a wreck removal was necessary before the sale took place, the related costs are equally prioritised with the costs for the sale.[191] The proceeds of the ship will be divided on a *pro rata* basis between the claimant of the costs related to the sale and the claimant of the wreck removal.[192] After paying out these costs, the law has created four categories of prioritised claims that will be paid out in the order as follows:

In the first place, costs related to the preservation of the ship after the arrest took place form a priority charge against the net fund.[193] These costs include the costs for repair which are indispensable for preserving the value of the ship. Secondly, crew wage arrears over a maximum period of 12 months are listed next in the order of priority.[194] Hereafter salvage claims and general average claims are ranked.[195] Unless otherwise provided, the salvage operation from which the claim originates has to be successful in order to be granted priority.[196] Last in line are the port dues, which rank after the salvage charge. Port dues did not always have this prioritised status however. As a consequence of a legislative change in 1991, port dues were not prioritised and ranked after the mortgage, meaning that ports could rarely recover their claims on the ship. Moreover, holders of a prioritised claim or a mortgage right had less incentive to obtain a quick outcome, since they had a higher ranking claim than the port. Since 2003 the law has changed in this regard and claims for port dues are again prioritised, ranking after the salvage charge.[197]

Privileged claims falling under the same category have an equal rank and are compensated on a *pro rata* basis.[198] As an exception, claims for salvage and contribution of the ship to general average rank against each other in the reverse order of the time they arose. Thus, the most recent claim precedes the oldest claim in order to encourage later assistance in a salvage operation. The interests and costs of enforcement related to a claim that falls within the aforementioned categories enjoy the same priority status as the main claim.[199] The prioritised claims extend moreover to all goods owned by the ship-owner which are, due to their destination, connected to the ship,[200] and they extend to any compensation related to the loss of the ship or any damages thereto which have not been repaired, including that part of

[191] Ibid., art. 210 para 2.

[192] Ibid., art. 210 para 3.

[193] Ibid., art. 211 (a).

[194] Ibid., art. 211 (b).

[195] Ibid., art. 211 (c).

[196] Ibid., art. 211 (c) see also J.H. Nieuwenhuis & W.L. Valk, et al., *Burgerlijk Wetboek, Boeken 6,7 en 8, Tekst & Commentaar* [Deventer, 2001] 2568–2568.

[197] DCC, book 8, art. 211 (d).

[198] Ibid., art. 213 para 2 and para 3.

[199] Ibid., art. 212.

[200] See pre-sale arrangements on ship appurtenances and ship components.

the remuneration for salvage, re-floating or an indemnity in general average which forms the counterpart for such loss or damage.[201]

b) Mortgages

After the liens have been paid out, the mortgage right is ranked next in line.[202] When there is more than one registered mortgage on the ship, the older mortgages take priority over more recent ones.[203]

c) Third Priority Claims

When the liens and mortgage claims have been satisfied, the third priority claims can be enforced against the proceeds on a *pari passu* basis.[204] Third priority claims constitute in the first place those claims against the ship-owner or bareboat charterer pursuant to contracts they made with the purpose of putting the ship into operation or to keeping it in operation.[205] Secondly, claims against a carrier and claims for collision or damage caused by the ship are also granted a third-priority claim.[206] Finally, also claims for which the owner may establish a limitation fund enjoy this third priority status.[207]

d) Unsecured Charges

Claims that do not enjoy a prioritised status will rarely be paid out as the funds will likely be exhausted when the priority claims are satisfied. Claims by foreign registries or classification societies, for example, will often not be paid out by the ship's proceeds. However in the interest of good and cooperative relationship, the outstanding claims are often paid out by the mortgagee or the purchaser of the ship.[208] Also, a right such as a possessory lien on a ship does not have any prioritised recourse action against the ship when surrendering possession.[209] In practice, a mortgagee or purchaser will settle the claim of the holder of the

[201] DCC, book 8, art. 214.
[202] Ibid., art. 204.
[203] Ibid., art. 21 para 1.
[204] Ibid., art. 217.
[205] Ibid., art. 217 para 1 a juncto 461, 462.
[206] Ibid., art. 217 para 1 b juncto 540 and 541.
[207] Ibid., art. 217 para 1 c juncto 752 para 2.
[208] W. Verhoeven, *Ships: Arrests; Registration and Mortgages; Enforced Sales in the Netherlands* [Rotterdam, 1995] 62.
[209] DCC, book 8, art. 210a.

possessory lien in order to have the ship released and arrested at a jurisdiction of his choice.[210]

3. Effects of Dutch Judicial Sale

A Dutch judicial sale of a ship has varying effects depending on whether the sale involved a Dutch or a foreign ship.

a) Effects on Dutch Registered Ships

After a Dutch ship is judicially sold in the Netherlands and once the sale price is paid by the highest bidder, all encumbrances attached to the ship are removed.[211] This effect is however not *ex officio* implemented in the Dutch registry. In fact, the purchaser has to request the provisional measures judge to declare that the sale took place in accordance with the legal requirements and that the sale price was duly paid.[212] This declaration can be inscribed in the registry and will give the registrar the right to delete the registered charges on the ship.[213] After the sale, the purchaser is in principle free to register the ship in a register of his choice. However, the owner can only register the ship in the Dutch registry if the new owner complies with the Dutch ownership[214] and registration[215] requirements. To prove his ownership to the

[210] W. Verhoeven, *Ships: Arrests; Registration and Mortgages; Enforced Sales in the Netherlands* [Rotterdam, 1995] 60–61.

[211] DCCP, art. 578 para 1 juncto 517.

[212] Ibid., art. 578 para 2 juncto DCC, book 3, art. 273 para 2.

[213] Ibid., art. 578 para 2 juncto DCC, book 3, art. 273, para 3.

[214] DComm.C, art. 311 stating that "a seagoing vessel has the Dutch nationality if 1) the vessel is under the ownership of one or more 1° natural persons who have the nationality of an EU Member State or Switzerland or which are equated with EU citizens; 2° companies which are incorporated in accordance with the law of an EU Member State or Switzerland; 3° legal persons, other than companies mentioned under 2°, to which the laws of an EU Member State or Switzerland are applicable; 4° natural persons, companies or legal persons, other than those mentioned under 1°,2° and 3° that invoke freedom of establishment under EU law; 2) the owner has its main office or branch in the Netherlands; 3) one or more natural persons who have their management office in the Netherlands are responsible, on behalf of the ship-owner, for the crew members and related matters and who have the power of decision and the power to represent the ship-owner; 4) one or more natural persons as mentioned under 3) or a deputy is permanently available and has the powers to act without delay if this is required."

[215] DCC, book 8, art. 194 stating that "1) a title or interest in a seagoing ship can be registered only: where it concerns a seagoing ship under construction: – if it is under construction and made within the Netherlands; where it concerns a completed (phased) seagoing ship: if it is a Dutch ship within the meaning of Article 311 of the Commercial Code; or where it concerns an offshore fishing ship: if it is registered in a register kept under Article 3 of the Fisheries Act 1963 (*'Visserijwet 1963'*).- 2) It is not possible to register a seagoing ship that is already registered in a public register, either

registry, he will have to provide the Dutch ship registrar with the civil law notary's protocol of the auction or the court's order regarding the ship.[216]

If the new owner wishes to register the ship in a foreign registry, he can apply to the district court for the deletion of the ship from the Dutch register.[217] When the ship, after the judicial sale, loses the status of a Dutch ship, the ship registrar will, *ex officio,* delete the ship after having received notice from the Ministry of Transport stating the fact that the ship does not qualify for continued registration.[218] When a proof of deletion of the ship is obtained, the ship can be registered in another registry, in accordance with the applicable foreign laws. As long as the ship remains registered in the Dutch registry, the registration of the ship and rights under a foreign registry will have no legal effect in the Netherlands.[219]

b) Effects on Foreign Registered Ships

If a foreign ship has been sold in the Netherlands, the court's order or the civil law notary's protocol will evidence the judicial sale.[220] This order or protocol usually also indicates that the judicial sale of the ship clears all encumbrances attached to it.[221] Whether or not this order is sufficient for deregistering the ship and its encumbrances from the foreign registry and, consequently, reregistering the ship in another foreign registry is a question of foreign law.

When the new owner complies with the registration[222] and ownership requirements,[223] the ship can be registered in the Dutch registry on the condition that it was

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as a seagoing ship or as an inland navigation vessel, or in any similar foreign register. – 3) In derogation from paragraph 2, it is possible to register a seagoing ship that is already registered in a foreign register when that ship, after its registration in that register has been deleted, shall be a Dutch ship within the meaning of Article 311 of the Commercial Code, or when that ship is registered as offshore fishing ship in a register kept under Article 3 of the Fisheries Act 1963 (*'Visserijwet 1963'*). Such registration, however, shall have legal effect only when it has been followed within 30 days by an annotation in the public registers, indicating that the registration in the foreign register has been deleted, or when, in the case that the keeper of that foreign register refuses to delete the registration in spite of a request to do so addressed to him, an annotation has been made in the Dutch registers of such request and of the fact that it has not been carried out."

[216] 1992 Kadasterbesluit, art. 25 lid 3 juncto www.kadaster.nl -> wijziging doorgeven -> form on changing the ship registration.

[217] DCCP, art. 195 para 4.

[218] DCC, book 8, art. 195 para 1, 5°. Where the Dutch ship has been sold outside the Netherlands, the deletion is subject to other conditions (see infra on the subchapter VI on the recognition of foreign judicial sales in the Netherlands).

[219] DCC, book 8, art. 196.

[220] DCCP, art. 578 para 2 juncto art. 3:273 para 2. No appeal is allowed against this order.

[221] DCCP, art. 570 para 2 juncto art. 525 and 575 para 5.

[222] DCC, book 8, art. 194 para 1.

[223] DComm.C, art. 311.

deregistered from its foreign registry.[224] When a deletion certificate is not available at the time of submission of the request to the Dutch registrar, the registry can nonetheless provisionally register the ship.[225] This registration will only have legal effect, however, if the certificate of deletion of the foreign registry is presented within 30 days of the provisional registration in the Dutch registry took place.[226] If the foreign registry for some reason refuses to deregister the ship after the Dutch registry has requested it to do so, the Dutch registrar could theoretically still register the ship, after recording that the request for deletion was refused by the foreign registry.[227]

VI. Recognition of a Foreign Judicial Sale and Its Legal Effects

Once a judicial sale is completed and the funds are divided among the creditors, the *lex executionis* will authorise the new owner to start trading with a clean slate. Nevertheless, under general international law, a sovereign state cannot compel another state to accept its rulings, in principle reserving to each individual state the authority to assign certain legal consequences to a foreign judicial sale.[228] This might be an open door for challenges which could be raised by, for instance, dissatisfied pre-sale claimants, owners who wish to contest a foreign judicial sale in some other (foreign) court or owners who refuse to consent to their registered rights being removed from the registry. In all these cases, the issue of recognition of the foreign judicial sale could be raised before a court which will then have to decide whether or not to recognise the validity of the foreign sale and extend the effects to its proper domestic law.

When there is no bilateral or international agreement applicable for deciding on the recognition issue, the domestic law and, in particular, the private international law will govern the situation where the recognition of a foreign sale is at stake. Since Dutch law does not specifically regulate the recognition of a foreign judicial sale and its effects, the subsequent analysis in this part will discuss the general law in respect of recognition issues and will apply it to the judicial sale of ships of both Dutch and foreign origin accordingly. Therefore, this part will in the first place approach the issue of recognition of a foreign judicial sale by discussing the relevant rules as to the recognition of foreign decisions. However, the issue of

[224] DCC, book 8, art. 194 para 2.

[225] Ibid., art. 194 para 3.

[226] Ibid., art. 184 para 3.

[227] Ibid., art. 184 para 3. Even if the Dutch registry did accept registration in this case, the new owner would probably have difficulties finding a new financer for the ship if it remains registered in another registry. See infra Subchapter VI on the recognition of a foreign judicial sale.

[228] For more about the implications of non-recognition: see infra Chapter 6.

recognition can also be approached from a different angle by relying instead on the domestic conflict-of-law rules applicable to proprietary rights that were created abroad. This part will further elaborate on this dual approach towards recognition in a Dutch context. Additionally, this subchapter will briefly touch on how the Dutch ship registry implements the effects of a foreign judicial sale.

1. Recognition of Court Decision

In the judicial practise of all EU member states, Brussels I and its chapter 3 replaces the autonomous national law regarding the recognition of foreign judgments. The instrument therefore plays a significant role in the recognition of court decisions.[229] However, in what follows, this part will only focus on the domestic private international law rules of the Netherlands and will thus not include situations to which European law is applicable.[230]

Dutch law does not prescribe the generally applicable procedure when recognition of a foreign decision is sought in the absence of a treaty or other law. Article 431 mentions that foreign decisions are not *enforceable* in the Netherlands and therefore fresh proceedings should always be started before one can enforce a judgement in the Netherlands.[231] Nevertheless, the article does not mention anything about the rules applicable when *recognition* of a constitutive judgment such as a judicial ship sale judgment is requested before the Dutch court.[232] In fact, over the years, the recognition of foreign judgments has been developed through Dutch case law so as to make recognition possible under certain circumstances.[233] Although the recognition of foreign judgments is technically still a matter of discretion of the judge, the Dutch courts have developed through case law three minimum requirements which the foreign judgment should meet before being subject to recognition. In the first place, the judge will usually assess on the basis of internationally accepted grounds whether the judge rendering the decision was competent to conduct the judicial sale.[234] When the ship was located in the foreign state's

[229] See Chapter 2.

[230] See Chapter 2 for the application of EU law and its importance for the recognition of foreign judicial sales of ships.

[231] DCCP, art. 431, paras 1 and 2. Regarding the enforcement of foreign decisions, see the subchapter on enforceable titles, supra.

[232] A time consuming re-trial is naturally not an option when it comes to a foreign decision on the judicial sale of a ship. Due to the fact that ships are movable property, it is also plausible that a Dutch court will not be competent to re-sell the ship in a new procedure. See in this respect: DCCP, art. 564 para 1 and 2.

[233] See also L. Strikwerda, *Inleiding to het Nederlandse Internationaal Privaatrecht* [Deventer, 2008] 274–275.

[234] HR 14 November 1924, *NJ* 1925, p 91 (Bontmantelarrest). This decision started the development of case law on the recognition of foreign judgments in the Netherlands. The voluntary appearance of the parties before the foreign court was in this case a basis for the Dutch court's

jurisdiction, the recognising judge will usually assume the foreign court was competent. Secondly, the procedure of the judicial sale has to safeguard a fair process,[235] which implies that the procedural steps are served on the relevant parties in accordance with the service laws.[236] This requirement is often seen as a part of the third requirement of recognition, this being that the decision taken has to be in line with Dutch public policy.[237] It is only in exceptional cases, however, that recognition can be refused on the basis of a violation of Dutch public policy.[238] In a set of cases from the 1930s, the Supreme Court of the Netherlands formulated criteria on the basis of which the public policy exception is a valid basis for refusing recognition.[239] The first criterion that the Dutch court specified is the *content* of the foreign decision. If the foreign decision violates what is to be understood as proper and lawful in accordance with the Dutch concept of public policy[240] or if the decision is outside the framework of what is allowed or possible in the Netherlands,[241] then the public policy exception can be applied. If the first criterion is not violated, then the judge will assess whether the *effects* of the decision are compatible with Dutch standards.[242] This second criterion as formulated by the Supreme Court of the Netherlands is, just as the first criterion, assessed on a case-to-case basis, attaching high importance to the extent the foreign law is connected to the Netherlands and its citizens.[243] If for example Dutch registered creditors were not informed of the foreign judicial sale of a Dutch ship infringing their rights, the Dutch court can arguably apply the public policy exception. If the foreign decision

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recognition of the foreign judgment. This requirement later developed into the requirement that the foreign court should be competent to deal with the case. See also Rechtbank Amsterdam 28 January 1970 Asser Institute AK 5845; President van de Rechtbank in kortgeding 9 mei 1983 *NIPR* 1984 nr. 130; Rechtbank. Zwolle 16 Augustus 1995 *NIPR* 1996 nr. 143. Rechtbank Arnhem 28 March 2012 *Rechtspraak.nl* nr. 214257.

[235] See for example Rechtbank. Zwolle 16 Augustus 1995 *NIPR* 1996 nr 143, Hof's-Hertogenbosch 4 September 1996 *NIPR* 1997 nr. 190 and Hof's-Gravenhage 20 November 2002 *NIPR* 2003 nr. 4; Rechtbank Rotterdam 5 November 2003, *NIPR* 2004, nr 57. Rechtbank Rotterdam 21 november 2006, *Landelijk Jurisprudentie* Nummer: AZ 5357.

[236] See also Chapter 2 on the 2007 Service regulation ant the 1965 The Hague Service Convention.

[237] Rechtbank Amsterdam 17 January 2002, *NIPR* 2002.

[238] Rechtbank Rotterdam 17 February 1995, *NIPR* 1996.

[239] The subject of the recognition procedure was a foreign conflict-of-law rule and not a foreign decision. However, the application criteria of the public policy exception are the same for foreign decisions. See on this point L. Strikwerda, *Inleiding to het Nederlandse Internationaal Privaatrecht* [Deventer, 2008], nr 270.

[240] See for example: HR 13 March 1936, *NJ* 1936, 281 & 282.; See also L. Strikwerda, *Inleiding to het Nederlandse Internationaal Privaatrecht* [Deventer, 2008], ftn. 64. See also Rechtbank Amsterdam 17 januari 2002, *NIPR* 2002 nr 64.

[241] See for example: HR 11 February 1938, *NJ* 1938, p 787; Hof 's Hertogenbosch 9 Oktober 1996, *NIPR* 1997, nr 73.

[242] HR 28 April 1939, *NJ* 1939, 895. HR 16 December 1983, *NJ* 1985, 311. Hof Amsterdam 8 januari 2004, *NIPR* 2004, nr. 209.

[243] L. Strikwerda, *Inleiding to het Nederlandse Internationaal Privaatrecht* [Deventer, 2008] 276.

was not taken in conformity with these aforementioned minimum requirements, the judge will not recognise the foreign judgment. In that case, a new auction can take place before the Dutch court if the ship is located within the jurisdiction of the Netherlands. Although minimum requirements are set by previous case law, the Dutch judge before whom recognition of a foreign judicial sale is brought will in principle have broad discretion in deciding whether or not to recognise a foreign judicial sale.

A recent case before the Dutch court of provisional measures[244] demonstrates how the recognition of foreign judicial sales is accomplished in the Netherlands. The case concerned a conservatory ship arrest in a Dutch port on the basis of the allegation that the—at that time Turkish registered—ship had been unlawfully sold in a public auction in China and this with the knowledge of the purchaser who had allegedly not acted in good faith. On that basis, the previous owner claimed that no lawful ownership could have been acquired by the purchaser and therefore contested the ownership of the purchaser of the ship at the auction. The previous owner argued that when two parties claim ownership over a ship, the Dutch conflict-of-law rules should determine which law is applicable to proprietary rights on the ship.[245] Since Dutch law designates the *lex registrationis* as the applicable law on proprietary rights on ships,[246] the original owner claimed that Turkish law was accordingly the proper law for determining who has ownership over the ship. As the judicial sale in China was contrary to Turkish public policy based on a Turkish decision rendered on the issuer in 2004,[247] the arrestor asserted that the validity of the Chinese judicial sale and its effects on ownership should not be recognised in the Netherlands. The Dutch court did not follow this approach and reasoned that Chinese law, giving the highest bidder a clean and unencumbered title to the ship, and not Turkish law is applicable for determining the effects of the judicial sale in the Netherlands. The *lex registrationis* had no part to play in the decision of the Dutch court to lift the arrest. Where the arrested ship had been located in the state in which the executing (Chinese) court was seated, Dutch courts will regard the judicial sale and its effects according to the *lex executionis* as conclusive against the whole world, irrespective of whether a different solution would have been found by the *lex registrationis* or Dutch law.

[244] Rechtbank Amsterdam, 7 May 2004, KG 04/912 *S&S* 2007, 108, 528–529.

[245] Ibid., 529.

[246] DCC, book 10, art. 127 para 2.

[247] Subsequently, Turkish law has changed, making it also possible to judicially sell a Turkish-registered ship abroad. See Chapter 6 Comparative study -> V. Recognition -> 1. Recognition of the court decision.

2. Recognition of In Rem Rights Created Abroad

If according to the *lex executionis*, the foreign judicial sale does not include the assignment of ownership to a purchaser, the Dutch conflict-of-law rules will be in place when the acquisition or the loss of rights *in rem* abroad is questioned in the Netherlands. According to general Dutch conflict-of-law rules the law of the state where the object is situated (*lex situs*)[248] determines the incidence of proprietary rights in movable and immovable objects.[249] Regarding registered ships, however, Dutch law, in avoiding that the proprietary status changes every time the ship sails into another jurisdiction, specifically provides that the *situs* is deemed to be the port of registry of the ship and not where she is physically situated during her trading activities.[250]

3. Recognition of Foreign Judicial Sale by Ship Registry

The Dutch registry is subject to judicial review and is bound by book 10 of the DCC and the Brussels I Regulation. Thus, if the Dutch court recognised the foreign judicial sale and its clearing effects, the Dutch registry will have to give full effect to the Dutch decision. Nonetheless, obtaining a review decision in a Dutch Court might be a practical hindrance and cost additional time which is to the disadvantage of the purchaser of the ship.

In practise, the purchaser of a ship, who according to the *lex executionis* obtained a free and unencumbered title could moreover be forced to cope with administrative encumbrances before he can truly start trading with the ship. In fact, the Dutch ship registration rules imply for example that, after a judicial sale on a foreign ship has taken place abroad, the new purchaser will in principle only have the ability to register the ship in the Netherlands if a deregistration certificate from the previous registry is obtained.[251] Also, in case of a ship registered in the Netherlands, the ship

[248] According to DCC, book 10, art. 5 (renvoi), Dutch conflict-of-law rules designate the substantive law of the *lex situs* and do not refer to the foreign conflict-of-law rules as such.

[249] DCC, book 10, art. 127 para 1.

[250] Ibid., art. 127 para 2.

[251] Ibid. art. 194 para 2. The recognition of the foreign judicial sale by the Dutch administration is however not, at least not theoretically, entirely limited to the foreign ship registry's willingness to implement the effects of a foreign judicial sale. When the previous registry refused to deregister the ship from its book even after parties explicitly asked for such action, the Dutch registry can register the ship and mention in its books that deletion was requested and refused by the foreign registrar. Such registration will, at least theoretically have legal effect in the Netherlands. (DCC, book 8, art. 194 para 3). In order to avoid confusion as to where the ship and its charges are registered, the ship registrar – and the potential ship financer – will in practice require such deletion certificate from the previous registry before a new registration will be effected. See www.kadaster.nl (last visited on 06.05.2014) -> aanvraag teboekstelling -> toelichting where the

registry requires additional action from the parties involved and sets its own requirements before deregistration can take effect. When the ship was, for example, registered in the Netherlands and sold abroad, the ship will only be deleted from the registry if the registered claimants and arrestors had been given the opportunity to exercise their rights or have consented to the deregistration.[252] The deregistration from the Dutch registry needs moreover the separate approval of the district court.[253] The deregistration costs and the court fees involved with this deregistration will be an actual encumbrance on the ship and will *de facto* be paid by the purchaser although he obtained the ship free of all encumbrances. The ship registry thus does not *ex officio* deregister the ship and/or make the appropriate changes to give effect to the foreign sale. So even if the foreign judicial sale decision has been recognised in a Dutch court, this does not have an immediate effect at the administrative level.

deletion certificate is a mandatory document that must be enclosed in the request to register the ship. The option as given in DCC, book 8 art. 194 para 3 to register a ship in the Dutch registry when the foreign ship registry refuses to deregister the ship is not provided in the information given by the kadaster.

[252] DCC, book 8, art. 195 para 1 b) 5°. The Dutch code, however, only regulates the deletion procedure for Dutch ships that do not qualify after the judicial sale for continued registration as Dutch ships (in accordance with DComm.C, art. 311). Whether deletion can be obtained if the ship is still qualified for continued registration in the Dutch registry is not clear under the law. Notwithstanding the limited applicability of the law on this matter, it is assumed that the deregistration rules also apply to the deregistration of a ship that continues to qualify as a Dutch ship. See therefore M. Mouthaan, A.I.M. Van Mierlo (et al.), *WPNR*, 143, afl. 6956, p 954–960.

[253] DCC, book 8, art. 195 para 4.

Chapter 5
Comparative Analysis: England and Wales

England and Wales are two countries within the United Kingdom of Great Britain and Northern Ireland which have had a unified legal system since the Laws in Wales Act 1535-1542 that came into force under Henry VIII. The maritime tradition is deeply embedded in the history of England.

Due to this strong maritime tradition and the presence of international maritime organisations, the laws of England and Wales (hereinafter referred to as 'English law') are nowadays still dominant in the maritime industry. The importance of English law in the maritime field makes it appropriate to also include this jurisdiction in the comparative study and assess the attractiveness of English law and the common law system in general for the judicial sale of a ship. This chapter will only discuss English laws and will leave out Scottish law and the laws of Northern Ireland.

I. Sources of Law

1. Applicable International Conventions

The United Kingdom has a dualistic approach towards the relationship between domestic law and international law. This implies that international law has to be incorporated into domestic law by an Act of Parliament in order for it to be applicable.[1] This system is a result of the sovereignty of Parliament to make

[1] The crown has only the prerogative to sign and ratify treaties while the Parliament is the only organ competent to legislate directly. See Maclaine Watson v. Department of Trade and Industry, 1989, *ILR* 81, p 701 where Lord Oliver stated that treaties are not self-executing and that consequently a treaty is not part of the English law unless and until it has been incorporated into the law by an act of Parliament. See also Lonrho Exports v. ECGD (1996, *ILR* 108, p 596, 611; A (A (FC) and Others (FC) v. Secretary of State for the Home Department, [2005] *UKHL* 71, para 27.

L. Bleyen, *Judicial Sales of Ships*, Hamburg Studies on Maritime Affairs 36,
DOI 10.1007/978-3-319-24376-4_5

laws. The accession to the European Economic Community put the strict dualistic approach of the United Kingdom under pressure however.[2] It is important to note that the United Kingdom is not a party to the 1926 and the 1993 Conventions on Maritime Liens and Mortgages.

2. Domestic Legal Sources

English law is based on a body of precedent such that case law forms the main part of the common law system. The principle of *stare decisis*, meaning that judges are bound to follow previous (higher) court decisions, is one of the cornerstones of the common law system. The common law system first began to evolve in the twelfth century, during the reign of Henry II (1121–1189) although statutes, mostly legislated by the King himself, developed during this period as well.[3]

Case law plays a significant role in the development of various important aspects of the English judicial sale procedure[4] and defines essential terms that are necessary to delimit the object and properties exposed to the judicial sale.[5] Basic procedural rules are enacted in the Civil Procedure Rules[6] whereas the legal basis for the jurisdiction of the Admiralty Court is described in the Senior Courts Act.[7]

a) Civil Procedure Rules

The 1999 Civil Procedure Rules[8] (hereinafter CPR) are a comprehensive set of civil procedural rules that are applied by English and Welsh courts.[9] The CPR consolidated the former civil procedure rules which were embodied largely in the 1883 Rules of the Supreme Court and the County Court rules. The unifying rules are adopted with the general goal to improve access to the judicial system in order to deal with cases justly.[10] Moreover, a supplemental protocol to the CPR, the Practise

[2] 1972 European Communities Act, chapter 68 as interpreted in the case Factortame Ltd v. Secretary of State for Transport, 1990, *AC* 85, p 140.

[3] D. Keenan, *English Law, Text and Cases* [Essex, 2007] 6.

[4] See for example The Myrto [1977] 2 *Lloyd's Rep*. 243.

[5] See on this point the development of the definition of a ship. Although statutory definitions of ships are numerous, the court specifically defined what "used in navigation" encompasses. See infra for subchapter on definition of ship.

[6] Civil Procedure Rules 1998, *SI* 1998/3132.

[7] Senior Courts Act 1981, chapter 54. The citation of the Act altered from Supreme Court Act to Senior Courts Act by the Constitutional Reform Act 2005 from 1 October 2009, *SI* 2009/1604. (Hereinafter SCA).

[8] Civil Procedure Rules 1998, *SI* 1998/3132.

[9] CPR, Part I, rule 1.2.

[10] Ibid., rule 1.1. (1) and (2) This part sets out the overriding objectives of the rules.

Directions (PD), gives practical advice as to how to interpret the rules.[11] Most parts of the CPR are accompanied by a practice directive that should be read together with the procedural rules. The relevant procedural rules for judicial sales of ships are found in parts 25 and 61 of the Rules. Article 25.1 specifies in which cases the court may apply interim measures. Specific procedural rules applicable to admiralty claims are set out in Part 61 whereas article 61.10 specifically lays down rules regarding the judicial sale of a ship. The applicability of this procedural provision will be further discussed in this chapter.

b) Senior Courts Act 1981

The Senior Courts Act specifies the grounds on which the various Senior Courts of England—the Court of Appeal, the High Court of Justice and the Crown Court—have jurisdiction. The Act gives the basis for the admiralty jurisdiction of the High Court to deal with judicial sales of ships.[12]

c) Merchant Shipping Acts

The various British Merchant Shipping Acts regulate merchant shipping and related matters ranging from oil pollution[13] to salvage[14] and maritime safety.[15] The Merchant Shipping Act dealing with registration[16] of ships is relevant for determining the effects carried by a judicial sale of an English ship.

3. Court System

The Admiralty Court, as a part of the Queen's Bench Division of the High Court, has jurisdiction to hear and decide on all maritime claims that are mentioned in the SCA, article 20 (2) (a)–(s) SCA,[17] can take preserving measures on the ship[18] and

[11] Ibid., rule 1.1. (1) and (2).

[12] SCA, art. 20.

[13] Merchant Shipping (Pollution) Act 2006.

[14] Merchant Shipping (Salvage and Pollution) Act 1994.

[15] Merchant Shipping and Maritime Security Act 1997.

[16] Merchant Shipping (Registration, etc.) Act 1993.

[17] SCA, art. 20 (2) (a)–(s). This provision is largely based on article 1 of the 1952 Arrest Convention. Admiralty matters used to be brought before county courts. Among the maritime claims within the admiralty jurisdiction, claims related to a mortgage on a ship, salvage, collisions, carriage of cargo, etc. are included.

[18] SCA, art. 33 (1) (a).

has the power to judicially sell a ship at any time after an application for an order of sale is made.[19] In practice, the ship can only be detained and sold in court if the ship is located within the port or anchorage located within the English waters as this will enable the serving of the warrant of arrest.[20]

The Admiralty Court can hear the maritime claims in the form of proceedings *in personam* or a proceeding *in rem*, whereas the latter is the form necessary to pursue an arrest of the ship which can eventually lead to a judicial sale on the occasion no bail is put up for the release of the ship.[21] The Admiralty Court is competent to order a judicial sale, which will be carried out by the Admiralty Marshal,[22] after the final judgment *in rem* is given or prior to a decision on the merits by means of an interim measure.[23] The rationale behind the possibility for the court to have a ship judicially sold prior to a judgment on the merits, also called a sale *pendente lite*, is to reduce any costs such as port fees and maintenance expenses during the time the ship is arrested, and thereby maximising the proceeds of the sale.[24]

It is customary in England that all writs and pleadings are conducted in the English language.[25] If an affidavid or witness statement is made in another language, the party wishing to rely on it should have the document translated first and should file this document together the original foreign language document with the court.[26] Moreover the translator must make and file with the court an affidavid verifying the translation and exhibiting both the translation and a copy of the foreign language document.[27]

As evidenced in the following chapters, a claim *in rem* and documents such as the arrest warrant will have to be served on a person or company in order to ensure that the relevant parties receive legal documents in which they have an interest. In England and Wales, the rules related to the *service of the claim form* and *documents* other than the claim form are entirely set out in the CPR, in Part 6 in respectively

[19] CPR, rule 61.10 (1).

[20] M. Tsimplis, 'Procedures for enforcement' in: Institute of maritime law (ed.), *Southampton on Shipping* [London, 2008] 357.

[21] Civil Procedure Rules, Part 61, rule 61.5. In accordance with English case law, the English Admiralty Court has, as a consequence of the arrest, jurisdiction on the merits of the case. Namely, the security obtained can only be effective if the decision on the merits is given by the same jurisdiction where the security is obtained. See therefore The Anna H [1995], 1 *Lloyd's Rep.* 11 (CA). See also M. Tsimplis, 'Procedures for enforcement' in: Institute of maritime law (ed.), *Southampton on Shipping* [London, 2008] 357. This is in line with article 7 of the 1952 Arrest Convention which specifies that the arresting state has jurisdiction to decide the case on the merits.

[22] CPR, rule 61.5 (8).

[23] Ibid., rule 25.1 (1) (v).

[24] For the procedural rules regarding this sale *pendente lite*, see infra on The Myrto [1977] 2 *Lloyd's Rep*. 243.

[25] For a historical overview of the use of English in English proceedings & courts see R. Morris, "Great Mischiefs – An Historical Look at Language Legislation in Great Britain" in: D.A. Kibbe (ed.), Language Legislation and Linguistic Rights [Amsterdam, 1998]32-54, 32-37 & 47-48.

[26] PD 32 para 10.2(1) & 23.2(1).

[27] Ibid. 32 para 10.2(2) & 23.2(2).

Section II and Section III. When it comes to the *service of a claim form* within the jurisdiction, the claim may be served on the defendant at an address at which the defendant resides or carries on business and which the defendant has communicated to the court for the purpose of being served with the proceedings.[28] If the defendant did not communicate his address at which he wishes to be served, the list as set forth in the CPR, rule 6.9 para 2 provides, depending on who or what the defendant is (individual, limited liability partnership, etc.), the places where service has to take place. When it comes to an individual for example, the place of service will be the usual or last known residence of the defendant. If however the claimant has reason to believe that the place of service as set forth by the list in rule 6.9 para 2 is an address at which the defendant no longer resides or carries on business, the claimant must take steps to find out the current address.[29] When such steps are taken and the current address is found, the claim form will have to be served at that address.[30] When the claimant is unable to ascertain the current address of the defendant, he must consider whether there is an alternative place where, or alternative method by which, service may be effected. If such alternative place or method is present, the claimant must make an application to the court to request that the claim form is served on the defendant by an alternative method or at an alternative place.[31] When however the claimant cannot ascertain the defendant's current residence or place of business and cannot ascertain an alternative place or method of service, the claimant may serve on the defendant's usual or last known address in line with the list given in rule 6.9 para 2. Unless otherwise provided, the main method of service in England and Wales is by first class post.[32] It is thus not relevant whether the defendant is at home or not. A claim form is deemed to be served within the jurisdiction on the second business day after the completion of the relevant step under rule 7.5 para 1.[33] For service by first class post this means that the relevant step required to obtain service is the posting, leaving with, delivering to or collection by the relevant service provider.[34] The service of a claim *in rem* can also be done on the ship against which the claim is brought by filing a copy of the claim form on the outside of the ship in a position which may reasonably be expected to be seen.[35] This might save a considerable amount of time.

[28] CPR, rule 6.8. Subject to CPR, Part 6 Section IV, the defendant can also give the business address of a European Lawyer (see European Communities Services of Lawyers Order 1978 (S.I. 1978/1919)) or solicitor in any EEA state or in Scotland or Northern Ireland as an address at which the defendant may be served with the claim form. See CPR, rule 6.7.

[29] CPR, rule 6.9 (3).

[30] Ibid., rule 6.9 (3).

[31] Ibid., rule 6.9 (5) juncto CPR, rule 6.15.

[32] Ibid., rule 6.3.

[33] Ibid., rule 6.14 juncto rule 7.5 (1).

[34] For a full list of the steps required in relation the particular method of service chosen: see the list in rule 7.5.

[35] PD 61 para 3.6 (1).

When it comes to the service of *documents* other than a claim form anywhere in the United Kingdom (England, Wales, Northern Ireland and Scotland), service will be given at the address the parties communicated to the court,[36] or if there is an alternative method or place of service which applies to service of a claim form in accordance with rule 6.15, this alternative method or place will also be applied to the service of documents. Depending on which method is used to serve the document, the CPR, rule 6.26 describes when the document is deemed to have been served. For first class post the deemed date of service is the second day after it was posted, left with, delivered to or collected by the relevant service provider provided that day is a business day.[37]

The rules applicable to the service of *claims* out of the jurisdiction are contained in CPR, Part 6 Section IV. Service outside the jurisdiction can be done without permission of the court when the addressee is located in Scotland, Northern Ireland[38] or in an EU Member State[39] or a state where the Lugano Convention is applicable.[40] If a party to be served is not within one of these jurisdictions, a claimant will have to request the court's permission to serve outside of the jurisdiction.[41] The court will only allow such service if the claimant has established that the claim has sufficient connection with England and Wales. A list with claims that establish sufficient connection is given in the PD, 6B para 3.1 to the CPR. In case of a claim *in rem*, a relevant connection would be that the claim is related to property i.e. a ship that is located within the jurisdiction as set forth by PD 6B, para 3.1. (20). Besides the ground relied on by para 3.2 of the PD 6B, the application for permission should also contain (a) a declaration that the claimant believes that the claim has a reasonable prospect of success and (b) the defendants address or, if not known, in what place the defendant is, or is likely to be found.[42] Alternatively, the service of a claim *in rem* can also be done on the ship against which the claim is brought by filing a copy of the claim form on the outside of the ship in a position which may reasonably be expected to be seen.[43]

When it comes to the service of *documents* outside the jurisdiction, the rules are very alike. Separate permission for such documents is however not required if such permission is already obtained for a claim form to be served out of the jurisdiction and notice is given in the claim form that other documents concerning the claim will also be sent to that address.[44] If a party has given an address for the purposes of serving documents in Scotland or Northern Ireland, a separate permission is not

[36] CPR, rule 6.23.
[37] Ibid., rule 6.26.
[38] Ibid., rule 6.32.
[39] Ibid., rule 6.33 (1) and (2) (b) (i).
[40] Ibid., rule 6.33.
[41] Ibid., rule 6.36.
[42] Ibid., rule 6.37 (1).
[43] PD 61 para 3.6 (1).
[44] CPR, rule 6.38 para (2).

required either.[45] The methods of service of a claim or other document on a party outside the jurisdiction are described in rule 6.40 and are largely in line with the methods used for service inside the jurisdiction.[46]

II. Requirements for a Judicial Sale

In what follows an analysis is given of the requirements that have to be met before a judicial sale can take place before the English Admiralty Court. Prior to analysing these requirements, this chapter will determine what objects can be judicially sold under the English rules on judicial sales of ships. The latter is of course only relevant if English law is applicable to the issue.

1. Asset Constitutes a 'Ship'

There are various definitions of a ship laid down in English statutory law. However, none of the definitions give an all-encompassing general definition of a 'ship', nor do they give an exhaustive definition of a ship for the purposes of an arrest and judicial sale.[47] From the latest case law on the matter it appears that only two elements are considered when assessing whether an object constitutes a ship according to English law. The fact whether an object is a ship depends in the first place on its physical appearance,[48] like for example having a hollow receptable for carrying goods or people.[49] In the second place, the definition of a ship requires that the object has to be "used in navigation", meaning that there is a need for "ordered progression over the water from one place to another", thus excluding jet-skis from

[45] Ibid., rule 6.38 para (3).

[46] Compare CPR, para 6.3 and CPR, para 6.40.

[47] The SCA 1981, for example, defines a ship as any "ship used in navigation, including a hovercraft", leaving open the meaning of the terms "ship" and "used in navigation". Similarly, the Merchant Shipping Act, section 313, by defining a ship as "every description of a ship used in navigation", does not give an exact meaning of what encompasses a ship in the framework of enforcement measures taken against the ship.

[48] Dependable Marine Co Ltd. v. Customs and Excise Commissioners [1965] 1 *Lloyd's Rep*. 550, 553. Steedman v. Scofield [1992] 2 *Lloyd's Rep*. 163, 165–166.

[49] Steedman v. Scofield [1992] 2 *Lloyd's Rep*. 163, dealing with the question whether a jet-ski constituted a ship. However, according to the Court of Appeal in Perks v. Clark [2001], 2 Lloyd's Rep. 431, a Canadian case, carrying persons or cargo was not an essential characteristic "so long as "navigation" was a significant part of the function of the structure in question, the mere fact that it was incidental to some more specialized function such as dredging or the provision of accommodation did not take it outside the definition; and "navigation" did not necessarily connote anything more than "movement across water"; the function of conveying persons and cargo from place to place was not an essential characteristic."

the definition of a ship.[50] Newly built vessels that are still in the dock of the shipyard and are not yet afloat, are not considered to be "used in navigation" and are thus excluded from the definition of a ship.[51] It is not entirely clear from English case law whether a "ship" that becomes wrecked after a casuality will cease to be a ship. In accordance with a Canadian case however, the categorisation of a structure, as a ship or not, should be governed by "its design and capability, rather than its actual use at any time", thus implying that the inability to use the ship does not prevent it from being a ship as such.[52]

A ship that is judicially sold will, unless otherwise stipulated, includes all property on board the ship "other than that which is owned by someone other than the owner of the ship".[53] The judicial sale of a ship will include also the ship appurtenances, defined by case law as "[. . .] "mechanical accessory or some apparatus or gear which appertained or belonged to the ship",[54] not including cargo or bunkers on board the ship[55] unless there is a salvage claim which extends to the cargo.[56]

As a general rule, foreign state-owned ships enjoy immunity from the jurisdiction of the English courts pursuant to the State Immunity Act of 1978.[57] State-owned ships that are engaged in commercial activities are exempted from this immunity as respects actions *in rem* that arose when the ship was conducting its commercial activity.[58]

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[50] R v. Goodwin [2006] 1 *Lloyd's Rep*. 432 citing Steedman v. Scofield [1992] 2 *Lloyd's Rep*. 163.

[51] The Andalusian (1877–78) P.D. 182.

[52] Perks v. Clark [2001], 2 *Lloyd's Rep*. 431. Compare European and Australasion Royal Mail v. P. & O. (1866), 14 *LT* 704 where the ship's immediate use, and not the nature of the structure, was relevant to determine whether the construction constituted a "ship". However, the court's finding that the vessel had become a mere chattel from the moment her main masts, spars and rigging were removed and stored for safe keeping, is a stand-alone case and considered to be based on an impression rather than on facts or reasoning. See therefore S. Rainey, 'What is a "ship" under the 1952 Convention', *LMCLQ* 11 February 2013.

[53] The Silia [1981] 2 *Lloyd's Rep*. 534. In this case, there were various claims against the owner of the ship, who was also the owner of the bunker oil. The fact that he was both the owner of the ship and the oil resulted in the decision by the Admiralty Court that an action *in rem* includes all property on board the ship which is owned by the ship-owner.

[54] The Eurosun and Eurostar [1993] 1 *Lloyd's Rep*. 106.

[55] See for example The Honshu Gloria [1988] 2 *Lloyd's Rep*. 66 and The Pan Oak, [1992] 2 *Lloyd's Rep* 36, as also referred to in The Eurosun and Eurostar [1993] *1 Lloyd's Rep*. 111.

[56] SCA, section 21(3), which establishes that a salvage claim is a maritime lien. If the cargo was salved under a salvage operation, the cargo owner will have to contribute to the costs the salvor incurred, as part of the general average adjustment. The salvor can in this case arrest and if necessary sell the salved ship, including the salved cargo and equipment, before the Admiralty court. See Merchant Shipping Act 1995, Section 226 (1) and (2).

[57] This act incorporated the European Convention on State Immunity (1972) and ratified the Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships, Brussels (1926).

[58] State Immunity Act 1978, section 10 (2). See also Crown Proceedings Act 1947, section 29. Only actions *in personam* can be started, in accordance with article 17 of the Act, for example salvage claims (see section 8 of the Act).

2. Ship Under Arrest

Before the ship can be judicially sold, it has to be under arrest in order to prevent the ship from leaving the jurisdiction.[59] A claimant can establish a right to arrest the ship in respect of claims *in rem* explicitly mentioned by statutory law.[60] There is no need for a connection between the person responsible for the claim and the ship when the claim is secured by a maritime lien or when the claim is related to the possession or ownership of the ship or any mortgages on the ship.[61] For the other claims[62] the person liable for the underlying claim has to be the beneficial owner or the bareboat charterer of the ship subject to the *in rem* proceedings at the time the action *in rem* is brought.[63] If the claimant successfully initiated an *in rem* process against the ship,[64] he will be able to apply for an arrest warrant with the Admiralty Court in accordance with the CPR and PD.[65] The warrant has to be properly served to proceed further with the actual arrest process.[66]

English law does not encompass the notion of an enforceable title. Under English law, therefore, no distinction is made between an executory and a conservatory arrest.

III. Preparations for the Sale

When the debtor has been served the arrest warrant, the creditor can rely on two different procedures under English law on the basis of which an admiralty sale[67] can be requested, depending on whether a final decision is available or not.

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[59] PD 61 §9.1 (1). See also The Berries (1905) Fo 497.

[60] SCA, sections 20–21. Which claims qualify as a claim *in rem* will not be further addressed in this research. See Chapter 1, Scope.

[61] SCA, section 20 (2) (a)-(c).

[62] Ibid., section 20(2) (e)-(r).

[63] Monica S. [1967] 2 *Lloyd's Rep*. 113, for a more elaborate explanation, see F. Berlingieri, *Berlingieri on arrest of ships* [London, 2011] para 7.81-7.93.

[64] CPR, rule 61.3(2), PD 61 Para 3.1 and 3.2. Form ADM1 is therefore used. The action must be properly served, filed, etc.

[65] The application has to include the ADM4 form, which declares that the claimant's attorney will pay the expenses with regard to the arrest, the costs related to the custody of the ship and – if applicable – the costs to release the ship. Furthermore, the application has to include a declaration as mentioned in CPR, section 61.5 (3) (b) in the form of ADM5, which states the nature of the claim and the name of the ship and the amount of security sought, PD 61 Para 5.3(1).

[66] For a detailed description of how the ship is arrested, see The Johnny Two [1992] 2 *Lloyd's Rep*. 257.

[67] A so-called admiralty sale includes only those sales where the purchaser receives a clean title after the judicial sale took place. Thus, an admiralty sale excludes, for example, a sale done by a port authority on the basis of the *Harbour, Dock and Piers Clauses Act of 1847*, which does not give clean title to the purchaser. See therefore The Blitz [1992] 2 *Lloyd's Rep*. 441.

In the first place, the creditor can petition the court for an order of sale after (1) a judgment on the merits issued by an English court has not been satisfied by the defendant or (2) a judgment in default has been rendered following the defendant's failing to take action on the claimant's suit.[68] However, on the occasion a judgment was obtained abroad, no direct arrest and enforcement under English law by way of an admiralty sale is possible due to the fact that a judicial sale order can be made by the Admiralty court only if an action *in rem* has been issued out of that court and such action may according to the SCA be effected only in respect of (unresolved) claims.[69] A judicial sale—extinguishing all encumbrances attached to the ship—can therefore be fulfilled only if the judgment creditor successfully instituted a fresh action *in rem* against the ship before an English court. In practice, a creditor can enforce a foreign decision *in rem* by bringing an action *in rem* against the ship to "complete the execution of [the] judgment, provided that the ship is the property of the judgment debtor at the time when she is arrested".[70] The judgement creditor could, however, always attempt to enforce a foreign decision by having it registered in the Court as a domestic decision, provided that it is capable of being recognised on the basis of either EU Regulations,[71] common law or statutory law.[72] After the foreign judgment has been registered as a domestic judgment, the judgment creditor can enforce the judgment by a writ of execution (*fieri facias*) as described in part 74 of the CPR. However, judicial sales resulting from this procedure do not give the purchaser a clean title.

The Civil Procedure Rules creates a possibility to apply for an order of appraisement and sale of an arrested ship at "any stage by any party" before a final judgment on the merits is given.[73] This second procedure under which a judicial sale can be achieved is often conducted on the occasion of mortgage enforcement[74] and enables the debtor to sell the ship without having a final decision on the merits of his claim. Case law has further developed the sale procedure before judgment—often referred to as a sale *pendente lite*—a procedure frequently used in English law. In the

[68] CPR, rule 61.9.

[69] SCA, art. 20 (1) (a).

[70] In practise, for example, the completion of an execution of a foreign judgment will be necessary when the arrested ship has been released by a foreign court upon the deposit of security, and after which the outstanding debt is left unpaid. Consequently, the judgment creditor might want to enforce this judgment by means of an admiralty sale (free of all encumbrances) while the ship is calling an English port. The Despina G.K. [1982] 2 *Lloyd's Rep*. 559. However this has not always proven to be successful in the past: See therefore The Alletta [1974] 1 *Lloyd's Rep*. 40 where it was decided that the right to arrest was lost due to a prior judgment.

[71] See therefore Chapter 2.

[72] See for example Foreign Judgment Act of 1993 and CPR Part 62, section III & part 74.

[73] CPR, rule 61.10 (1). Other means of recognition are available, such as recognition under the Foreign Judgments Act of 1933, the Arbitration Act of 1975, CPR, part 74, and PD; however, these acts recognise *in personam* judgments, i.e. judgments which cannot be the basis for ordering a sale free and clear of all encumbrances.

[74] R. Heward, 'England & Wales' in: Maritime Law Handbook, C. Breitzke & J. Lux et al (eds.), *Maritime Law Handbook* [London, 1993], Suppl. 6, part III, p 2.

milestone case of The Myrto, Mr. Justice Brandon determined for the first time the circumstances under which an order for a sale *pendente lite* can be made.[75] In that case a merchant bank financed the owners for the purchase of a ship and secured this loan with two mortgages on the ship. At a subsequent point, the owners did not pay the sums due under the two mortgages, after which the bank arrested the ship and applied for a sale of the ship *pendente lite* on the grounds that the ship "was a wasting asset while under arrest and it was therefore in the interest of all parties that she should be sold now".[76] In reaction to the arrest, the charterers of the ship applied for a release of the ship on the basis that the "arrest was an unlawful interference with their rights".[77] The Court dismissed the application for the release of the ship for the reason that such a release should only be granted in a clear case of wrongful arrest, which the present case did not represent.[78] As to the bank's application of the sale of the ship *pendente lite*, Mr. Justice Brandon stated that there has to be a "good reason" for the court to order an appraisement and sale of the ship when no final settlement has been obtained.[79] In its decision whether there was a "good reason" to order a sale *pendente lite* of the ship, the court took into consideration the default of defence committed by the ship-owner's not providing satisfactory security for the claims of the mortgagee. If the owners would have provided such security, the ship would normally be released from the arrest, or if the plaintiff nevertheless applied for an order of sale, the court would examine "more critically than it would normally do in a default action the question whether good reason exists or not".[80] This was however not the case when the plaintiffs applied for a sale *pendente lite* of the Myrto. The second ground on which the court ordered a sale *pendente lite* of the Myrto was to avoid extensive maintenance costs—which would otherwise be indispensable so as to avoid impairment of the ship—and the numerous costs in connection with the arrest such as the crew's wages, insurance costs, and supply of oil, water and food. These costs, incurred while waiting for a suitable trial date, would cause the devaluation of the bank's security over the ship.[81] For these reasons, the court used its discretion to order a sale of the ship *pendente lite* and mentioned that in doing so it was also protecting the rights of all third parties which might possibly be relieved of costs that they might incur for discharging the cargo on board the arrested ship.[82] By outlining what constitutes "good reason" to order a sale *pendente lite*, the court set the basic standard for future applications for an

[75] The Myrto [1977] 2 *Lloyd's Rep*. p 243–261.

[76] Ibid., p 243.

[77] Ibid., p 243.

[78] Ibid., p 244.

[79] Ibid., p 260.

[80] Ibid.

[81] Ibid. Mr Justice Brandon stated that "on the assumption that the action will remain contested and proceed to trial, such trial would, unless expedited, be unlikely to come on for about 1.5 years. Even if the trial were expedited, I doubt if it could come on in much less than seven months".

[82] The Myrto [1977] 2 *Lloyd's Rep*. p 261.

order of a sale and appraisement of a ship *pendente lite*.[83] If, notwithstanding the condition for a sale pendent lite are met, the underlying claim is found unfounded in a later judgment on the merits, the plaintiff will have to compensate the owner for his losses.

1. Sale Order

When the pre-sale requirements are met and when the aforementioned preparations have been made, the court will issue a sale order to the Admiralty Marshal, who will conduct the sale under the authority of the Admiralty Court. The Court will also state how and within which timeframe notice of claims against the proceeds of the sale must be given.[84] Once an order of sale is announced, the ship can no longer be sold by private agreement,[85] unless all parties agree.

2. Admiralty Marshal

The Admiralty Marshal is an officer of the Admiralty Court and is responsible for enforcing the sale order made by this Court[86] irrespective of whether the application for an order was filed *pendente lite* or after judgment. He is responsible for making all preparatory arrangements that are necessary to organise the judicial sale, such as drafting the conditions of sale.[87] During its arrest, the Admiralty Marshal has custody over the ship[88] and can take measures necessary to preserve the ship,[89] avoiding however expenses that might result in a significant decrease of the proceeds. Moreover, the Marshal has the duty to achieve the highest possible

[83] The APJ Shalin [1991] 2 *Lloyd's Rep*. 62–67, the Cerro Colorado [1993] 2 *Lloyd's Rep*. 243.

[84] CPR, rule 61.10 (2).

[85] The APJ Shalin [1991] 2 *Lloyd's Rep*. 67. Here the Admiralty Court reasoned that negotiating a private sale after the order of sale was made "might affect the market because they could have the result that potential bids will be withheld." However, if all parties agree to have the ship privately sold after the order has been given, this is possible. See The Monmouth Cost (1922) 22 *Ll. L.Rep*. 22 and The Ruth Kayser (1925) 23 *Ll. L.Rep*. 95.

[86] See ADM14 PD 61.10, 9.2.

[87] If a party does not agree with the measures taken by the Marshal prior and during the sale process, he may "apply to the registrar for a ruling". See PD 61, undertakings.

[88] See for example The Hoop (1809) 4 *C Rob* 145, 146, where it was stated that "[t]he credit of the Court is concerned in the safe-keeping of the property under its protection. If any such property is lost, it is at least the duty of the marshal to be prepared to show that it was not lost by any default of his." As referred to by S.C. Derrington & J.M. Turner, *The law and practice of admiralty matters* [Oxford, 2006] 120. See also APJ Shalin [1991] 2 *Lloyd's Rep*. 63.

[89] The Westport (No 2) [1965] 1 *Lloyd's Rep*. 549. In this case, repair measures were taken by the Marshal on the advice of the brokers in order to safeguard the interest of all the claimants.

price.[90] In order to fulfil these duties, the arresting party should "give to the Admiralty Marshal a personal undertaking to pay on demand the fees and expenses of the Marshal incurred by him or on his behalf in respect of the appraisement and sale of the property, or of endeavours to appraise or to sell the property".[91]

3. Valuation

After the court has made an order for a judicial sale, one or more brokers will, on the request of the Marshal, appraise the ship based on its characteristics, for whose determination the Marshal can hire a surveyor to inspect the ships' condition.[92] The value of the ship will furthermore be dependent on the market forces and on the further stipulated conditions of sale. An appraisement is significant during the sale process as it protects mortgagees against a bid below the estimated value of the ship. Namely, the Marshal can only accept those bids that fall below the valuation price when the court orders that this be done.[93] At the pre-sale stage, the Marshal will not communicate the estimated value to other parties. Appraisement will not take place where a court orders the ship to be sold to a specific buyer at a certain price. These court-approved private sales avoid time-consuming appraisement, advertisement, and bidding procedures.[94]

4. Advertisement

After the ship is surveyed and valuated, the Marshal will instruct his brokers to advertise the sale in an international journal. This advertisement will include a ship description and will usually invite interested parties to submit sealed bids before a certain date. As opposed to a public auction, the method of sealed bids excludes parties from increasing their bids after the period of giving bids is expired.[95] The advertisement, moreover, contains information as to how interested parties can inspect the ship and where they can obtain the Marshal's conditions of sale. The Marshal's sale conditions usually include information as to the subject of the sale,

[90] The Silia [1981] 2 *Lloyd's Rep.* 534–535.

[91] ADM14, PD 61.10, 9.2.

[92] An appraisement and valuation will not be necessary in case the ship is sold by way of a "hybrid sale", i.e. a private sale which is approved by the court and which is an alternative to a judicial sale. See Chapter 6 where this is further discussed.

[93] ADM14, PD 61.10, 9.2.

[94] This will be further discussed in the comparative chapter, where alternatives to the ordinary judicial sale procedure are discussed.

[95] See infra "IV. Judicial sale" of this subchapter.

payment, and delivery details and whether the ship is sold "as is where is".[96] The eventual purchaser of the ship will have to sign these conditions of sale in order to acquire possession over the ship. Before the ship is eventually sold, the Marshal will inform those who filed claims against the ship about the coming sale.

5. Dispute and Claim for Dissolution

After the Admiralty Court has ordered a sale but before the sale is concluded, a party may apply for the suspension of the sale process and rescission of the sale order which may result, if successful, in the release of the ship.[97] Dissolution of sale will however only be granted in rare occasions and on the condition that there are sufficient funds available to cover the claims on the ship.[98] In the *Acrux* case, the application to suspend the order of sale was granted initially, but the order was rescinded when the court learned that the security provided was not sufficient to meet the existing claims.[99]

IV. The Judicial Sale

Under English law, there are no specific rules as to how the sale should be organised. In most judicial sales taking place in England & Wales, the Marshal invites the potential purchasers to send written tenders that usually include the name of the bidder, its agents, and the bid validity period.[100] As a general rule, the person submitting the highest bid above the appraised value purchases the ship.[101] After the highest bidder has paid the purchase price into court and after he has signed the conditions of sale, the Marshal will deliver the ship, her accompanying

[96] Usually, the Marshal makes only a few amendments to the more standardised provisions on the conditions of sale.

[97] See for example The Acrux [1961] 1 *Lloyd's Rep*. 471.

[98] See therefore S.C. Derrington, J.M. Turner, *The law and practice of admiralty matters* [Oxford, 2006] 172. A claim for dissolution during the sale phase is filed only on rare occasion as when the debtor in fact has security available, he will usually provide it already during the arrest phase in order to minimise the loss of use of the arrested ship.

[99] The Acrux [1961] 1 *Lloyd's Rep*. 472–473.

[100] See for the practical side of conditions of sale in R. Heward, 'England & Wales' in: Maritime Law Handbook, C. Breitzke & J. Lux et al (eds), *Maritime Law Handbook* [London, 1993], Suppl. 6, part III, p 12.

[101] The owners of the MV "Union Gold", owners of the M/V "Union Silver", owners of M/V "Union Emerald" and the owners of the M/V "Union Pluto", 1 *Lloyd's Rep*. [2014] 53.

registration documents, and certificates.[102] In England and Wales, the Marshal's bill of sale will evidence the full and unencumbered ownership of the purchaser.[103] The sale is final and definite and cannot be appealed. When however the highest bid was below the appraised value, the Marshal will inform the enforcing creditor and those who opposed the release of the ship about the appraised value.[104] Moreover, he will apply to the Admiralty Court for leave to sell the ship for a price below its appraised value.[105] Creditors are allowed to oppose this application and request the Court to have the ship re-advertised and auctioned a second time with the hope of obtaining a higher bid.[106] When the Court is not convinced that there would be a better bid in a second sale round, the Court can nevertheless fulfil the request for a second auction day on the plaintiffs giving an undertaking with the effect of indemnifying the Court against any loss which might be sustained as a result of the highest bid of the first sale day having been refused.[107] Although a second auction day is thus perfectly possible in case a bid lower than the appraised value was forthcoming on the first auction day, it is not considered to be a preferred solution for circumventing a low bid since it could cause a considerable delay in the distribution of the sale proceeds and it bears the risk that an even lower sale price is ultimately obtained.

V. Post-sale Phase

When the payment of the purchase price is fulfilled, the claims against the ship will now stand against the proceeds of the sale. Those creditors who obtained a favourable judgment can apply to the court for the payout of their claims *in rem*[108] or—if the fund is not sufficient to pay out claims—for a determination of

[102] See example of conditions of sale in R. Heward, 'England & Wales' in: Maritime Law Handbook, C. Breitzke & J. Lux et al (eds), *Maritime Law Handbook* [London, 1993] Suppl. 6, part III, p 12.

[103] R. Heward, 'England & Wales' in: Maritime Law Handbook, C. Breitzke & J. Lux et al (eds), *Maritime Law Handbook* [London,1993] Suppl. 6, part III, p 13.

[104] R. Heward, 'England & Wales' in: Maritime Law Handbook, C. Breitzke & J. Lux et al (eds), *Maritime Law Handbook* [London,1993] Suppl. 6, part III, p 11–12.

[105] Halcyon the Great (No 2) [1975] 1 *Lloyd's Rep*. 525.

[106] Ibid.

[107] Ibid.

[108] CPR, rule 61.10 (5). In situations where the creditors have relatively small claims against the fund but the value of all claims together exceeds the amount available in the court, the Admiralty judge might in rare occasions decide to proceed with the payout of creditors without a judgment *in rem* so that these creditors can avoid the costs for obtaining a final judgment on the merits. See R. Heward, 'England & Wales' in: Maritime Law Handbook, C. Breitzke & J. Lux et al (eds), *Maritime Law Handbook* [London, 1993], Suppl. 6, part III, p 27.

priorities.[109] Parties who filed notice of their claim against the proceeds have to be informed about any such applications made.[110] The fund in the court is under the authority of the Admiralty judge, who will also decide, if necessary, on the priority of the existing claims.[111]

1. Priority and Payout

Unless the fund available in the court is sufficient to cover all the judgment claims, the English court will determine the priority of the claims made against the fund before the distribution of funds is done.[112] In the exercise of admiralty jurisdiction, the matter of ranking claims is considered to be of a procedural nature. Therefore, under English conflict-of-law rules, priorities between competing claimants over the proceeds of the sale of the ship falls to be determined by the *lex fori* as if the events lying at the basis of the claim occurred in England.[113] When a judicial sale has taken place before an English court, English law will thus be the only relevant law on the basis of which the priority between claims is determined. The *lex fori* principle is also extended to the classification of claims as such. Even where a foreign claim may be classified by its *lex causae* as a lien and would therefore take priority over a mortgage, the validity of a foreign lien and its effects under English law will be subject to the *lex fori,* this being the law applicable to matters of a procedural nature.[114]

Notwithstanding the fact that case law largely establishes the ranking rules, the admiralty court has the discretion to adjust this *prima facie* priority system in accordance with the principles of equity and considerations of public policy.[115] This can, in rare occasions, cause the judge to adjust the *prima facie* ranking. In what follows, the customary ranking system and the several claim categories as developed by English case law are discussed.

[109] CPR, rule 61.10 (3).

[110] Ibid., rule 61.10 (4), PD 9.1.

[111] Ibid., rule 61.10 (3), PD 9.3.

[112] SCA, section 21 (6).

[113] The Colorado [1922] 13 *Ll. L.Rep*. 310. The Halcyon Isle [1980] *2 Lloyd's Rep*. 325.

[114] See infra 'maritime liens' on The Halcyon Isle [1980] *2 Lloyd's Rep*. 326–327.

[115] The Pickaninny [1960] 1 *Lloyd's Rep*. 533, 537. However, it is clear that the judge will only deviate from the *prima facie* ranking on occasions where great injustice would be done if decided otherwise.

a) Unranked Prioritised Claims

Before the Admiralty Court distributes the fund to the claimants, some claims will be paid out in priority over any other claim. The Admiralty Marshal's expenses necessary to realise the sale[116] enjoy this kind of priority.[117] Such expenses, ranging from port charges[118] and classification society dues[119] to crew charges[120] and repair costs,[121] enjoy a paramount status over all other charges against the fund. After the Admiralty Marshal has recovered his costs, the Court grants priority to those costs the producer(s) of the fund incurred for the arrest, appraisement, and sale of the ship.[122] These costs are made for the benefit of all other claimants[123] and should be borne by all creditors.[124] Therefore these costs enjoy a prioritised status as well.

b) Maritime Liens

English case law recognises four different maritime liens. Firstly, the costs incurred to salve a ship enjoy the status of a maritime lien. The salvage lien has priority over all other liens attached to the ship *before* the salvage operation took place[125] for the reason that without the salvage action, the property to which the other liens are attached could not be preserved.[126] On the occasion that multiple salvers were cooperating in one successful salvage operation, the fund will be divided on a *pro rata* basis between the salvers,[127] whereas the claim of a later salver will supersede

[116] Within his duty to preserve the ship under safe custody.

[117] The Falcon [1981] 1 *Lloyd's Rep*. 13, 17; The Rubi Sea [1992] 1 *Lloyd's Rep*. 634.

[118] The Freightline One [1986] 1 *Lloyd's Rep*. 266, 272. This occurs in the event that the port authority does not exercise its statutory power of detention and the Marshal pays off the authority in order to pursue the arrest and subsequent sale.

[119] The Honshu Gloria [1986] 2 *Lloyd's Rep*. 63, 65. This occurs in the event the Marshal pays the expenses to keep the ship in class.

[120] See on this point The Myrto (No 2) [1984] 2 *Lloyd's Rep*. 341, 348–349; The Gioseppe di Vottorio (no 2) [1998] 1 *Lloyd's Rep*. 661, 663. This occurs in the event the Marshal entered into an agreement with the crew members to provide services for the safe custody and preservation of the ship in return for the undertaking of the Marshal to pay the crew's wages.

[121] The Westport (No 2) [1965] *Lloyd's Rep*. 549, 549–550.

[122] The Falcon [1981] 1 *Lloyd's Rep*. 13, 14. The Rubi Sea [1992] 1 *Lloyds' Rep*. 634, 636. The costs do not include costs incurred for obtaining a judgment on the merits. See The World Star [1987] 1 *Lloyd's Rep*. 452.

[123] Although it is not necessary to prove the actual benefit for the other claimants. See on this The Leoborg (No 2) [1964] 1 *Lloyd's Rep*. 380.

[124] The Ocean Glory [2002] *Lloyd's Rep*. 679, 680.

[125] The Mons [1932] 43 *Ll. L.Rep*. 151; *The Ruta* [2000] 1 *Lloyd's Rep*. 359, However, in *The Lyrma (*No 2) [1978] 2 *Lloyd's Rep*. 30, it was decided that the salvage lien will supersede those wage claims that came into existence both before and after the salvage action took place.

[126] The Lyrma (No 2) [1978] 2 *Lloyd's Rep*. 30.

[127] The Russland [1924] 17 *Ll. L.Rep*. 308.

the earlier one on the occasion of several salvage attempts.[128] Secondly, a damage lien enjoys priority after any later salvage lien, and it is ranked before the third and fourth recognised lien on respectively seamen's wages and master wages and disbursements[129]; however, this ranking can change when the court finds this necessary against the backdrop of producing an equitable solution.[130] If there are several damage liens formed out of—for example—multiple collision claims, the claimants are paid equally and without preference.[131] The same *pro rata* ranking method applies among multiple crew wages and master disbursement claims[132] The lien on wages includes all kinds of payment made in respect of services rendered to the ship,[133] including the ship-owner's contribution to the pension fund.[134]

The recognition and ranking of foreign maritime liens has been largely debated in literature[135] since the ruling of the Privy Council in the *Halcyon Isle* in 1981.[136] In that case, an unpaid repair claim from an American shipyard resulted in a maritime lien under US law on the repaired ship. The majority decision in the case pointed out that the *lex fori* will be applied in order to recognise and rank foreign maritime liens. Lord Diplock reasoned in this majority decision that maritime liens are rights that are "procedural or remedial only, and accordingly the question whether a particular class of claim gives rise to a maritime lien or not is one to be determined by English law as the *lex fori*".[137] Based on this decision, a foreign lien holder will not enjoy any prioritised right if the particular lien does not fall within the previously mentioned categories of liens recognised by English law. The consequence of the majority's view is a claim is not protected by a lien under the *lex causae* while it is protected according to English law, then the claim will be

[128] The Lyrma (No 2) [1978] 2 *Lloyd's Rep*. 30, 34.

[129] The Ever Success [1999] 1 *Lloyd's Rep*. 831.

[130] The Ruta [2000] 1 *Lloyd's Rep*. 364. In this case claimants of wages had no alternative form of redress other than claiming against the proceeds of sale. Therefore, the court decided to grant the claim for crew wages priority over the two damage liens on the basis of so-called equitable considerations.

[131] The Ruta [2000] 1 *Lloyd's Rep*. 359; The Mons [1932] 43 *Lloyd's Rep*., 152–153.

[132] Among each other, seamen's wages and master disbursements are considered to be equal. This is stated in the Merchant Shipping Act 1995 section 41. "The master of a ship shall have the same lien for his remuneration, and all disbursements or liabilities properly made or incurred by him on account of the ship, as a seaman has for his wages". See as an example The Ever Success [1999] 1 *Lloyd's Rep*. 828.

[133] The Castlegate [1893] *A.C*. 38, p 52.; Severance pay does not constitute a maritime lien against the fund of the ship as this kind of compensation is not "payable for the services to a ship". The Tacoma City [1991] 1 *Lloyd's Rep*. 330, 348.

[134] The Halcyon Skies [1977] 1 *Lloyd's Rep*. 461, 464.

[135] P. Myburgh, 'Recognition and priority of foreign ship mortgages', LMCLQ, 1993, 155, 159.; R., Garnett, *Substance and Procedure in Private International Law* [Oxford, 2012], 6.65. D.-C. Jackson, *The Enforcement of Maritime Claims* [London, 2005], para 23.89. See infra (comparative chapter) on the criticism on *lex fori* rule.

[136] The Halcyon Isle [1980] 2 *Lloyd's Rep*. 325, 330.

[137] Ibid., 325, 339.

considered to be a lien under the *lex fori*. With this decision, the Privy Council evidently is trying to protect the ship financer's rights against foreign claims. The dissenting Law Lords recognised that this decision has some clear weaknesses and that "it would be a denial of history and principle, in the present chaos of the law of the sea governing the recognition and priority of maritime liens and mortgages, to refuse the aid of private international law".[138] The dissenting view finds support in earlier English cases, where the doctrine was to first apply the *lex causae* to determine the validity and nature of the claim, after which the effective foreign right was fit into the established hierarchy under British law.[139]

c) Possessory Liens

Common law creates a right for unpaid shipyards to hold possession over the ship until payments for repair costs have been satisfied.[140] On the condition that continued possession over the ship is maintained,[141] the shipyard's claim enjoys the status of a lien against the ship's sale proceeds.[142] A claim based on a valid possessory lien will be ranked after all pre-existing liens but before all liens that were formed after possession had been taken.[143]

d) Mortgages

Mortgages, regardless under which jurisdiction the charge was registered, usually rank right after the maritime liens and the possessory liens, if any.[144] A registered domestic mortgage will always take priority over an unregistered mortgage whereas

[138] Ibid.

[139] The Colorado [1923] 13 *Ll.L.Rep*. 474, p 123. The Zirgurds [1932] 43 *Ll.L.Rep*. 156, p. 113 as referred to in D.C. Jackson, *Enforcement of maritime claims* [London, 2005] 683.

[140] The Tergeste [1903] *P*. 26.

[141] Considering that the expenses associated with the possession i.e. maintenance costs, crew wages etc., lie with the shipyard, the latter's claim should be ranked relatively high in order to not disincentivise possession. When the claim is minimal in comparison with, for example, the mortgage on the ship, the claim will usually be dealt with before the priority of claims is determined. See on this issue S.C. Derrington & J.M. Turner, *The law and practice of admiralty matters* [Oxford, 2006] 183.

[142] The Tergeste [1903] *P*. 26, 32, where Phillimore J stated [. . .] "it is the duty of the material man not to contend with the admiralty marshal; to surrender the ship to the officer of the court, and let the officer of the court, under the order of the court, remove and sell her; but when he has done that, the court undertakes that he shall be protected, and that he shall be put exactly in the same position as if he had not surrendered the ship to the marshal.[. . .]"

[143] The Tergeste [1903] *P*. 26, 32.

[144] The Ruta [2000] 1 *Lloyd's Rep*. 359.

on the occasion of competing domestic mortgages, an older mortgage will take priority over a later registered one.[145]

Although in practice foreign mortgages are routinely enforced in English courts and are given the same priority as an English mortgage, it could however be argued that in accordance with the *lex fori* theory, as applied to the validity of liens,[146] English registered mortgages will take priority over foreign mortgages, which will only have the status of an "equitable charge".[147] From case law, however, it could be concluded that the *lex fori* rule as applicable to the validity of foreign liens is not extended as such to foreign mortgages. In order to adequately secure the mortgagee, the validity of foreign mortgages is determined by the *lex registrationis*, this being the law of the state where the ship is registered.[148]

e) Statutory Rights of Actions

Statutory rights *in rem* rank after the maritime lien and mortgage claims. Statutory rights include, for example, claims for damage done by the ship, charter party claims, and claims for bunkers.[149] Among each other, statutory rights *in rem* are ranked equally.[150]

f) Non-ranked Claims

On the rare occasion that the fund in the court is not exhausted after the claims *in rem* have been satisfied, the remaining fund is paid back to the ship-owner or to those having a claim *in personam* against him.[151]

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[145] Keith v. Burrows [1877] 2 *App. Cas*. 636. Barclay v Poole [1907] 2 Ch. 284. As referred to in A.M. Sheppard, *Maritime Law and Risk Management* [London 2007] 373. See also Merchant Shipping Act 1995, para 8 schedule I. Note that unregistered mortgages are very rare.

[146] See supra on The Halcyon Isle [1980] 2 *Lloyd's Rep*.

[147] *"Betty Ott" v General Bills Ltd* [1992] 1 *NZLR*. The Betty Ott decision was later reversed by the Ship Registration Act, 1992, s70.

[148] The Angel Bell [1979] 2 *Lloyd's Rep* 491. See also Para 6.63.

[149] SCA 1981, section 20 (2) (e) to (r).

[150] The Africano [1894] *P*. 141.

[151] The Silia [1981] 2 *Lloyd's Rep*., 534. However, in the event there is also an insolvency procedure started against the company owning the ship in question, the funds will usually fall into the hands of the liquidator.

2. Effects of English Judicial Sale

An English judicial sale of a ship has various effects depending on where the ship was registered.

a) Effects on English Registered Ships

After a judicial sale of a British ship has been completed before the Admiralty Court and when the new owner is not eligible to register the ship in the British registry, the registered or beneficial owner can file an application to remove the ship from the British register.[152] The UK ship registry will with this action recognise the Admiralty Court's bill of sale as a valid title transferring ownership and deregister the encumbrances attached to the ship.[153] If the new owner is entitled to register the ship in the British registry,[154] the register will record the transfer of ownership, after which the new owner can still request a deletion and register the ship elsewhere.[155]

b) Effects on Foreign Registered Ships

If a foreign ship has been sold by the English Admiralty Court, the bill of sale will evidence the change of ownership and the deletion of all encumbrances attached. Whether the registry state recognises this bill of sale is a matter of foreign law. English case law has been clear about the validity of its bill of sale as a title against the world as stated already in early case law. In *The Tremont* [1841],[156] Dr. Lushington declared that the jurisdiction of the Admiralty Court on the matter

[152] Merchant Shipping Act 1995, Part II, section 10 (2) (k) juncto Registration Regulation 1993 (No. 3138), section 56 (1) (a) & (b). See also application for deletion form MSF 4744, available at https://www.gov.uk/government -> publications -> application to remove British ship from UK register.

[153] The Tremont [1841] 1 *W Rob* 163, 166 *ER* 534.

[154] Merchant Shipping Act 1995, Part II, section 9 (2) (a)-(b) juncto Registration Regulation 1993 (No. 3138), section 7. "The following persons are qualified to be the owners of ships which are to be registered on the UK Ship Register: a British Citizen; a British Dependant Territories Citizen; a British Overseas Citizen; Companies incorporated in one of the EEA countries; Citizens of an EU member state exercising their rights under art. 48 or 52 of the EU Treaty in the UK; Companies incorporated in any British overseas possession which have their principal place of business in the UK or those possessions; or *Societas Europaea*. When none of the qualified owners are resident in the UK, a representative person must be appointed who may be either: an individual resident in the UK or Company incorporated in one of the EEA countries with a place of business in the UK."

[155] A new buyer who is entitled to register in the UK registry but who wishes to register the ship with a foreign registry usually changes ownership in the British registry first; afterwards he can deregister and register somewhere else. This is to circumvent the potential of a usually lengthy process of recognition regarding the bill of sale in the foreign registry.

[156] 1 Wm. Rob. 163, 164.

of a judicial sale "is confirmed by the municipal law of this country and by the general principles of the maritime law; and the title conferred by the Court in the exercise of this authority is a valid title against the whole world, and is recognised by the courts of this country and by the courts of all other countries." This statement also found support in later case law, such as in the *Acrux*[157] and the *Cerro Colorado*.[158] In the former case, an Admiralty Marshal arrested and sold the *Acrux*, an Italian steamship, in England to satisfy the admiralty judgment in proceedings *in rem* brought by Banco di Sicilia.[159] However, the purchasers of the ship faced great difficulties with regard to de-registration of the ship in Italy, as Italian law did not recognise the judgments on the sale of the Acrux being free and clear of all encumbrances. Namely, the Italian registry did not recognise that a ship sold during proceedings *in rem* can be sold with a clean title.[160] Consequently, mortgagees still had their rights against the ship and could start proceedings in Italy or elsewhere, which was of course not favourable for the new owner.[161] The English court in this case stated in its decision that the clean title given by the court was valid and was due recognition in maritime courts around the world.[162] It may be that the proceedings of the sale were not sufficient to satisfy all the claims on the ship, but this loss should, according to the court in this matter, fall entirely on the mortgagees.[163] The innocent purchaser should therefore be able to register the ship and start trading without any obstacles. Therefore, the court stated clearly that it would be "intolerable, inequitable and an affront to the Court if any party who invoked the process of this Court 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 Court recognises proper sales by competent Courts 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 maritime trade".[164] Any claim on a foreign registered ship predating the judicial sale will on the basis of this decision not be taken into consideration. Here, the court gave priority to its own decision on the matter instead of applying the conflict-of-law rules on the foreign registered property rights. Furthermore, the court requested the mortgagees not to start any proceedings *in rem* or similar proceedings abroad against the *Acrux*. It was reported later that the mortgagees followed the request of the court; yet it is unknown whether the buyer in good faith obtained the required certificates of deletion from the Italian registry and consequently registered the ship in a registry of his choice.

[157] Acrux [1962] 1 *Lloyd's Rep*. 405, 409.
[158] Cerro Colorado [1993] 1 *Lloyd's Rep*. 58, 60.
[159] Acrux [1962] 1 *Lloyd's Rep*. 405.
[160] Ibid., 406.
[161] Ibid., 407.
[162] Ibid., 408.
[163] Ibid., 409.
[164] Ibid., 409.

This decision was followed by the Court in the *Cerro Colorado*.[165] In this case, the Spanish Authorities published a notice in reaction to the forthcoming sale of the Spanish registered ship before the English Admiralty Court proclaiming that the new purchaser will not acquire the ship free and clear of all encumbrances. More in particular, the Spanish advertisement maintained that crew wage claims will continue to attach to the ship, notwithstanding the Marshal's judicial sale terms and conditions stating differently.[166] The Admiralty Court did not accept this, finding its support in *The Acrux* and earlier cases on the matter[167] and stating that it is part of the comity of nations as well as a contribution to the general well-being of international maritime trade if judicial sales free of encumbrances conducted in one state are recognised as such abroad.[168] The court, moreover, held that the advertisement was considered a contempt of court interfering with the administration of justice.[169]

In line with the English court's view with regard to the English judicial sale giving the new owner an absolute clean title against the world, the English legislator did not under its old laws explicitly oblige the new owner to provide a certificate of deletion from the previous foreign registry upon registering the ship in the UK registry. The Merchant Shipping Act merely requires the new owner to "take all reasonable steps to secure the termination of the ship's registration under the law of that [foreign] country."[170] In practise, the British legislator's flexible view with regard to the new owner's registration rights was made stricter by the UK ship registry requiring the new owner of the ship in question to provide the UK ship registry with a deletion certificate issued by the ship's foreign register within 6 weeks after registration onto the UK ship register.[171] The UK ship register made the effects of an English sale of a foreign ship therefore partially dependent on the foreign register's recognition of the English bill of sale. In so doing the UK registry takes into considerations the vested *in rem* rights existing in respect of the foreign registered ship before giving certain effects—such as registration—to the English sale. It should however be mentioned, that the UK ship register is bound by judicial review and will therefore have to give effect to the judicial sale if the court obliges the administration to do so. Arguably, the refusal of the English registry to register the new owner's rights might constitute a contempt of court.[172]

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[165] Cerro Colorado [1993] 1 *Lloyd's Rep.* 58.

[166] Ibid.

[167] Castrique v. Imrie, (1869) *L.R.* 4 *H.L.* 414. Acrux [1962] 1 *Lloyd's Rep.*, 409. Cerro Colorado [1993] 1 *Lloyd's Rep.* 58.

[168] Cerro Colorado [1993] 1 *Lloyd's Rep.* 58, 61.

[169] Ibid.

[170] Merchant Shipping Act 1995, Part II, section 9(5).

[171] This is stated in the rules of practise as issued by the UK ship-registry. See www.gov.uk/government -> uploads -> A guide to registration Part I (last checked on 13 August 2014).

[172] Compare: Cerro Colorado [1993] 1 *Lloyd's Rep.* 58, the fact that the foreign registry did not provide a deletion certificate might according to this case constitute a contempt of court.

VI. Recognition of a Foreign Judicial Sale and Its Legal Effects

1. Recognition of Court Decision

In the judicial practise of all EU member states, Brussels I and its chapter 3 replaces the autonomous national law regarding the recognition of foreign judgments. The instrument therefore plays a significant role in the recognition of court decisions.[173] However, in what follows, this part will only focus on the English private international law rules and will thus not include situations to which European law is applicable.[174]

The recognition of a foreign judicial sale judgment rendered by a court outside the European community[175] is subject to common law rules. The position of the English court towards the recognition of a foreign judicial sale of a British registered ship has been clear since the case of Louis Castrique v. William Imrie and Another (1869),[176] stating that "where a foreign Court, having competent jurisdiction in the matter, and honestly exercising it, delivers, in a proceeding *in rem*, a judgment, by which the sale of a chattel is ordered, the sale cannot afterwards be impeached in this country in an action against the vendee, even though the person seeking to impeach it would, by the law of this country, have a preferential title to the chattel here."[177] Under the authority of *Louis Castrique v. William Imrie*, the court will, in the event of someone denying the free and unencumbered title of the purchaser, recognise the foreign judgment that assigns the ship to the purchaser at the auction. If the ship was validly transferred abroad,[178] the new *bona fide* purchaser can thus rely on the judgment as to the assignment of property to prove his title of ownership.[179] Only in the unlikely case that the recognition of the foreign

[173] See Chapter 2.

[174] See Chapter 2 for the application of EU law and its importance for the recognition of foreign judicial sales of ships.

[175] See Chapter 2 for the recognition of judgments given by a court in the EU. Such judgment will be directly recognisable in an English Court in accordance with the Brussels I Regulation.

[176] *L.R.* 4 *H.L.* 414.

[177] The chattel here was a British ship lying in a foreign port.

[178] The question whether the property was validly transferred abroad will be determined on the basis of the *lex situs*, the law of the state in whose jurisdiction the ship was located when it was judicially sold. See in this regard Dornoch Ltd. and others v. Westminster International BV and Others [2009] *EWHC* 889, para 17 and question 8. In question 9 of this same case it was further determined that the law of the actual *situs* of the ship, rather than law of the artificial *situs* (law of the place of registry), is the relevant law to govern the validity of the transfer of rights abroad. See also A.V. Dicey & J.H.C. Morris *et al*., *The conflict of laws* [London, 2012] 717.

[179] Cammel v Sewell [1860] 5 *H. & N.* 728, 746. as referred to in A.V. Dicey & J.H.C. Morris *et al*., *The conflict of laws* [London, 2012] 717, fn. 404. In the case at issue, it was decided 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."

judicial sale decision would be contrary to English public policy is a foreign judicial sale decision subject to challenge.[180]

2. Recognition of In Rem Rights Created Abroad

If according to the *lex executionis*, the foreign judicial sale does not cover the assignment of ownership to a purchaser, the English conflict-of-law rules will be in place when the acquisition or the loss of rights *in rem* abroad is questioned in England. In case of an ordinary sale transaction, English law appoints the *lex situs* i.e. the physical *situs* of the ship at the time it was sold, as the law applicable to determine existence of proprietary interests in ships prior to, at the time of, and after the alleged transfer of the ship.[181] There is no recourse in that regard to the *lex registrationis* of the ship since ship registries are considered as only dealing with legal title and not with proprietary interests as such.[182] In other words, the registries are considered to be a mere *prima facie* record of rights and do not give title or rights by the fact of registration.

3. Recognition of Foreign Judicial Sale by Ship Registry

Even though the English courts do not attach any importance to the law of the place of registry when an issue of recognition arises, the UK ship registry does let the *lex registrationis* play a part in administratively implementing the proprietary effects of a judicial sale of a ship, unless a court order compels the registry to act differently. More in particular, on the occasion of a foreign ship being sold abroad and the new owner wishing to register his ownership on the UK ship registry, the English court will only allow such registration upon delivery of a written undertaking authored by the new owner to provide a deletion certificate within 6 weeks after registration, unless the registry is bound by a review decision of a court.[183]

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[180] A.V. Dicey & J.H.C. Morris *et al*., *The conflict of laws* [London, 2012] rule 51, with para 14-159 of this rule making reference to the ECHR, where it is mentioned that recognition could be refused when it would be contrary to the Convention.

[181] Dornoch Ltd. and others v. Westminster International BV and Others [2009] *EWHC* 889, question 9. In this case it was determined that the law of the actual *situs* of the ship, rather than law of the artificial *situs* (law of the place of registry), is the relevant law governing the transfer of rights created abroad.

[182] Tisand (Pty) Ltd v The Owners of the Ship MV "Cape Moreton" (ex "Freya") [2005] *FCAFC* 68 para 146–148. as referred to in Dornoch Ltd. and others v. Westminster International BV and Others [2009] *EWHC* 889, question 9.

[183] See UK ship register regulations on www.gov.uk/uk-ship-register-for-merchant-ship-and-bare boat-charter (last checked on 29 July 2013).

When it comes to registered ships, it is moreover also important to note that the UK register does not *ex officio* delete its ships and their encumbrances upon notice of the foreign judicial sale decision. When it comes to the deregistration of a ship, a separate application has to be made by the registered or beneficial owner,[184] whereas the deregistration of registered encumbrances can only be effected if the inscribed creditors have agreed to the discharge[185] or, in the event no agreement is obtained, if the court orders the discharge of the charges upon presentation of the foreign judicial sale decision. Even if the English court recognises the foreign judicial sale and its clearing effect, the administrative costs and possible court fees related to the deregistration of the ship are an actual encumbrance on the ship and will *de facto* be paid by the purchaser, even though he obtained the ship, according to the *lex executionis*, free and clear of all encumbrances.

Notwithstanding these practical hindrances, it is important to note that the UK ship registry is subject to judicial review and is bound by the English international private law and the Brussels I Regulation. Thus, if the English court recognised the foreign judicial sale and its clearing effects, the UK ship registry will have to give full effect to the English decision. Nonetheless, obtaining a review decision in an English court might be a practical hindrance and cost additional time which is to the disadvantage of the purchaser of the ship.

[184] Merchant Shipping Act 1995, Part II, section 10 (2) (k) juncto Registration Regulation 1993 (No. 3138), section 56 (1) (a) & (b). See also application for deletion form MSF 4744, available at https://www.gov.uk/government -> publications -> application to remove British ship from UK register.

[185] Merchant Shipping Act 1995, Part II, section 10 (2) (k) juncto Registration Regulation 1993 (No. 3138), section 57 (c). See e.g. discharge section on the back of the statutory mortgage form which has to be completed by the mortgagee, after which the register discharges the charge.

Chapter 6
Comparative Analysis: Summary

In the event of an irreversible default situation, creditors will often seek the law of those jurisdictions favourable for enforcing their claim by judicial sale. There are several reasons why the enforcing creditor, usually the financing bank, prefers some jurisdictions to others. Naturally, the location of the ship already narrows down the claimants' choice of jurisdiction, if there is a choice at all, for enforcing their claim. The port in the vicinity of the ship in question or the jurisdiction where the ship is at berth or will be at berth will usually be considered first as a possible *forum* for arresting and selling the ship through the court. Besides the geographical location, the economic situation and ship sale market in a state might also play a role in the *forum* choice of a creditor. In fact, ports that are located in the proximity of busy shipping lanes or that provide important shipping services such as bunker supplies are certainly favoured over ports that do not provide these services or that are located in a state with an unstable economic environment. In addition, the efficiency and cost-effectiveness of the *conservatory* arrest procedure in general can likewise have an impact on the choice of the *forum*. Although these aspects certainly have their influence on the popularity of a *forum*, this comparative chapter will however focus primarily on the legal differences between the discussed jurisdictions as regards the judicial sale procedure and its associated processes. More in particular, those elements influencing the popularity of the judicial sale procedure of a certain *forum* will be discussed with a focus on the mortgagees' position.[1]

Considering that the old adage 'time is money' is undoubtedly applicable to the shipping business, parties involved in a judicial sale procedure typically favour jurisdictions featuring a *quick and efficient procedure*. The reason why a judicial sale should be conducted with the necessary procedural speed is quite plain certainly taking into consideration that a judicial sale procedure is costly for all

[1] The focus will be on the mortgagee's position since he usually has the largest share in the totality of claims. Often he will be the one initiating the sale.

L. Bleyen, *Judicial Sales of Ships*, Hamburg Studies on Maritime Affairs 36,
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parties. The longer the procedure takes, the more costs such as port fees, legal fees and maintenance payments accumulate, having a negative impact on the sale fund. Moreover, during good freight markets, the opportunity loss of idling reduces the transportation capacity available to the ocean freight market to the detriment of all actors in the industry. Besides the procedural speed, also the degree of *protection* of claims is essential when selecting the appropriate *forum*. Creditors typically aim at maximising their claim recovery and prefer a *forum* that has established a system which facilitates this. In light of these two main characteristics of a popular judicial sale *forum*, this comparative summary will identify the main differences between the discussed jurisdictions. The competitive environment between states will furthermore be illustrated by expanding the comparison where appropriate to jurisdictions that have not been previously discussed.

There is however one other aspect that is of utmost importance to all parties involved in a sale: the international recognition of the judicial sale and its effects. Due to the procedural differences, the world-wide recognition of a judicial sale of a ship taking place in one state proves to be no sinecure. Since domestic recognition procedures often require that the judgment to be recognised is comparable to a judgment that would have been rendered in the recognising state, the recognition of a judicial sale of a ship may be more difficult than the recognition of other decisions, where differences between judicial practices are less marked. The international recognition of a judicial sale procedure and its effects is of utmost importance for the success of the procedure as a whole. Therefore, the issue of recognition will also be an integral part of this comparative summary.

I. Enforceable Title vs. Sale *Pendente Lite*

As a first comparative aspect affecting the favourableness of a procedure, this comparative summary identified the need of an enforceable title as opposed to the possibility of selling the ship pending procedures, the so-called sale *pendente lite*. This procedural difference can have an effect on the time frame of the judicial sale.

In most civil law jurisdictions, such as in Belgium and the Netherlands, the condition precedent for initiating a judicial sale procedure is an enforceable title such as a court judgment, arbitration award bearing the executory formula or a notarial deed that includes an enforceability clause.[2] Notwithstanding the fact that the creditor has the option to take precautionary measures such as initiating a conservatory arrest to establish jurisdiction and await a judgment on the merits, a judicial sale as such can only be initiated when the creditor has obtained an enforceable title. Obtaining such title in the first place might cost time, certainly when the enforceable title cannot be constituted by a notarial deed that includes an enforceability clause. In the case no such notarial deed can be presented, a judgment

[2] This is not possible for creditors whose claims are not based on a notarial deed.

has to be obtained, the length of which is largely dependent on the circumstances of each case: whether the case was contentious, whether a judgment in default can be given or whether the judge found urgent grounds to decide the case in summary proceedings.[3] Since some jurisdictions tend to have more experience in dealing with maritime matters[4] than others, the time needed for obtaining an enforceable title through a domestic procedure varies from state to state and largely fluctuates on a case-by-case basis.

Once the claimant fulfils the requirement of having an enforceable title, the problem of cross-border enforceability might arise, certainly if the title is obtained in a non-European state. The lack of any effective international Convention or bilateral treaty concerning the enforcement of foreign non-European judgments can complicate the enforcement procedures considerably. However, from the discussed jurisdictions the Netherlands and England—notwithstanding their rather conservative legislation on the enforcement of foreign judgments[5]—and Belgium prove to have an open attitude towards the recognition of non-EU judgments.[6]

In avoiding domestic enforcement procedures, the claimant could of course start new procedures in order to obtain a fresh enforceable title. In doing that, the enforcing creditor might however incur even more lost time. In Belgium, for example, a usual period of 8 days[7] between the service of the proceedings and the initial hearing will be increased up to 88 days if the judgment on the merits is against a debtor who is located outside the EU.[8] The additional time period applicable in situations where the debtor is not based in the EU will also be in

[3] In the Netherlands for example it is possible to obtain an enforceable title in summary proceedings, DCCP, arts. 254 & 258.

[4] See the next subchapter on 'II Court System'.

[5] In England see SCA, art. 20 (1) (a) stating that a judicial sale order can be made by the Admiralty court only if an action *in rem* has been issued out of that court and such action may according to the SCA be effected only in respect of (unresolved) claims. A judicial sale – extinguishing all encumbrances attached to the ship – can therefore be fulfilled only if the judgment creditor successfully instituted a fresh action *in rem* against the ship before an English court. In the Netherlands see DCCP, art. 431, para 1 states that an enforceable title given by a foreign court is in principle not enforceable within the Netherlands. The court will thus, at least in theory, have to decide on the matter again.

[6] For the Netherlands see supra on HR 14 November 1924, *NJ* 1925, 91 that was followed in other decisions such as HR 26 September 2014, NJB 2014/1778, HR 17 December 1993, *NJ* 1994/348, HR 17 December 1993, *NJ* 1994/350. See supra for England on The Despina G.K. [1982] 2 *Lloyd's Rep*. 559. Unlike the Netherlands and England, the Belgian legislation on the recognition of foreign judgments is moreover very clear-cut, see BCIPL, arts. 22–26 and Chapter 3.

[7] BCCP, art. 707.

[8] In practice, however, the master of the ship is considered to represent the ship-owner. C. Smeesters, G. Winkelmolen, *Droit Maritime et Droit Fluvial* [Brussels, 1929], nr. 169. Therefore, documents can be directly served on him, avoiding the additional period applicable to distant debtors. Nevertheless, when the master is not present on the ship due to for example the ship-owner's insolvency, the distance period could still be in place on the basis BCCP, art. 55. See on this point also Chapter 3, Belgium, section II, 2.

place for the calculation of the appeal period applicable in Belgian courts.[9] This all could, of course, delay the entire procedure and will affect creditors who are seeking to obtain a new enforceable title.

Once the enforcing claimant has obtained a (recognised) final enforceable title in a certain *forum*, the actual executory arrest phase can start after the service requirements are fulfilled.[10] When precautionary measures were already taken before the judgment came out, an official conversion from the conservatory arrest to an arrest in execution is required in both the Netherlands and Belgium.[11] In Belgium in particular, this conversion only comes after the command of payment given in the conservatory phase is recorded in the appropriate register, including the specification of the conversion of the arrest into an executory one.[12] Although it is usually the mortgagee taking the initiative to arrest the ship of a defaulting owner, it might be that a claimant obtains an enforceable title against someone who is not the owner of the ship under conservatory arrest. This might raise the question whether the conservatory arrest is always convertible into an executory arrest, even in the case the judgment is not against the owner of the arrested ship.[13] The discussed civil law jurisdictions do not have any clear provision in their laws regarding the question against whom the enforceable title should be and whether all conservatory arrests can be converted into an executory one even in the case when the enforceable title is against someone who is not the owner of the ship in question.[14] Even though this situation is not likely to occur as the mortgagee is usually the one seeking enforcement, these are questions with which an enforcer can lose time and money when such question arises. When no notarial deed including an enforceability clause is available, the requirement of an enforceable title and all the related processes can for these reasons be a true burden for the enforcing creditor and can be avoided by turning to a common law jurisdiction that does not have the requirement of an enforceable title and even allows sales *pendente lite,* as practised in most common law jurisdictions.

In England and Wales, the creditor can pursue his claim by an action *in rem* i.e. against the ship.[15] It is hereby irrelevant whether the ship-owner is personally liable for the claim or not. If the action *in rem* is available under English law, the Admiralty Court will issue a warrant of arrest on the condition that the claimant made a valid arrest application.[16] Although a sale order can be given after a

[9] BCCP, art. 1048 juncto art. 55.

[10] Cf. BCCP, art. 1545 *juncto* art. 1499, 1549, 1550 and DCCP, art. 563, 565 para 3. Both codes prescribe that the executory title and a command of payment should be served by the debtor before any executory arrest – which also has to be served – can be made.

[11] Cf. BCCP, art. 1497 and DCCP, art. 704.1.

[12] BCCP, art. 1497, para 2.

[13] For a discussion of Belgian law on this matter see Chapter 3, Belgium, section II, 2.

[14] Cf. Chapter on convertibility under Dutch or Belgian Law.

[15] CPR, section 61.3.

[16] CPR, 61.5 (2) CPR and PD, Part 61.5, rule 5.2.

judgment is rendered, the creditor usually applies for a sale while litigation is pending. The possibility of a sale *pendente lite* can be of significant importance when a creditor is selecting a *forum* as this procedure, when applied by the court, can save a substantial amount of time and money.[17] Taking into consideration that a ship incurs considerable costs during its arrest, the longer a decision on the merits takes, the greater the diminution in return when the sale is complete. When the financial situation of the debtor has reached irreversible levels, as is often the case in a judicial sale procedure, a *sale pendente lite* offers the secured creditor the possibility to prevent any further decrease in value of the arrested ship. The claimant can apply for a sale *pendente lite* as early as 14 days after the service of the claim form *in rem*.[18] This possibility of such sale at a relatively early stage of the procedure is laid down in the English Civil Procedure Rules[19] and has been further developed by court rulings on the matter.[20] The diverse existing case law demonstrates that the court can decide on a case-to-case basis—without infringing the rights of the debtor—whether there is sufficiently good reason for issuing a sale order before judgment.[21] When the case is not defended in court and when the ship-owner is financially unable to provide security in order to release the vessel from the arrest, it would be highly redundant to await a suitable trial date and a decision on the matter when the ultimate outcome is plainly foreseeable. The time-loss incurred in that case would very likely lead to an impairment of the ship's financial position, which is to the detriment of all parties involved, ranging from mortgagees and possible cargo-owners to the defaulting ship-owner himself, if he has any residual interest. Looking however to the interests of the ship-owner, the *sale pendente lite* should be applied carefully and only when there is sufficiently good reason to do so.[22]

The availability of a sale *pendente lite* seems to be a typical common law construction: Besides England, also states such as Singapore,[23] Hong Kong,[24]

[17] CPR, 61.10. See also the landmark judgment on the matter: The Myrto [1977] 2 Lloyd's Rep 243.

[18] PD, Part 10, rule 10.3.

[19] CPR, 25(1)(c)(v) juncto 61.10 (1).

[20] See for example The Myrto [1977] 2 *Lloyd's Rep*. 243. See Chapter 5, England and Wales, II, 3.

[21] The Myrto [1977] 2 *Lloyd's Rep*. 243. The APJ Shalin [1991] 2 *Lloyd's Rep*. 62–67. Tacoma City [1991] 1 *Lloyd's Rep*. 330. The Cerro Colorado [1993] 2 *Lloyd's Rep*. 243. Bank of Scotland plc v The owners of the MV "Union Gold", owners of the M/V "Union Silver", owners of M/V "Union Emerald" and the owners of the M/V "Union Pluto" *Lloyd's Rep*. 53.

[22] The Myrto [1977] 2 *Lloyd's Rep*. 243.

[23] Singapore Supreme Court of Judicature Act, 1969, Section 18 para 5, empowering the Singapore courts to sell property *pendente lite*. The Myrto case forms the basis for the practical application of the procedure: see The Opal 3 ex kuchino [1992] *SLR* 585.

[24] High Court Ordinance, Cap 4, section 42. The Myrto case forms the basis for the practical application of the procedure: see Dongname Shipping Co Limited v. Owners of the ship of vessel Alacrity [1994] *HKCFI* 214.

Australia[25] and New Zealand[26] offer the possibility of a sale pending proceedings. Civil law jurisdictions do not have this device and are not open to amending their laws in that regard, notwithstanding the practical advantages of such a procedure. A good example here is Germany, which recently changed its maritime trade legislation, simplifying the arrest of ships[27] but not taking the opportunity to amend the judicial sale procedure: An enforceable title remains a prerequisite for initiating a judicial sale procedure.[28] Also in Belgium, the preparatory documents concerning the reform of procedural maritime law indicate that the choice of a *sale pendente lite* is inconceivable in a civil law jurisdiction due to the fact that a ship, being a very valuable object, should not be sold before the claims are found to be legitimate.[29] Nevertheless, the value of the ship itself could also form a basis for allowing a sale *pendente lite*, as it typically prevents the devaluation of the ship after a lengthy arrest period.

However, when assessing the possibility of a *sale pendente lite* against the need of an enforceable title, one should take into consideration that there are various possibilities of acquiring an enforceable title. In the context of a judicial sale of a ship it is therefore important to note that an enforceable title may not only be obtained by a judgment but could also be constituted by a notarial deed: creditors (mortgagees) whose claims are based on a notarial deed, can include an enforceability clause in the notarial deed with which they can enforce their claims directly.[30] Since it is usually the mortgagee initiating a judicial sale procedure, the argument that a sale *pendente* lite is in terms of time more advantageous than the civil law concept of the need of an enforceable title, needs to be seen in a nuanced light.

[25] The Commonwealth Admiralty Act 1988, section 10 and Admiralty rules 1988, rule 50 *juncto* rule 69. The Myrto case forms the basis for the practical application of the procedure: see Marinis Ship Suppliers (Pty) Ltd v Ship Ionian Mariner (1955) 59 *FCR* 245.

[26] Judiciary Act 1908, section 51 and High Court Rules of Schedule 2, rule 7.55. The Myrto case forms the basis for the practical application of the procedure: see Uab Garant v Aleksandr Ksenefontov [2008] 746 *LMLN* 1.

[27] Bundesgesetzblatt Jahrgang 2013 teil I Nr. 19, ausgegeben zu Bonn am 24. April 2013, 831–867, 867. Claimants are no longer required to provide grounds for arrest (the so-called "Arrestgrund"). The amended provision can be found in the Zivilprozessordnung in der Fassung der Bekanntmachung vom 5. Dezember 2005 (BGBl. I S. 3202; 2006 I S. 431; 2007 I S. 1781), § 917. Hereinafter referred to as ZPO.

[28] ZPO, § 870a.

[29] Commission voor Maritiem recht, tiende Blauwboek over de herziening van het Belgisch scheepsvaartrecht, Proeve van belgisch scheepsvaartwetboek (privaatrecht), 2012, p 188.

[30] Belgium: Hypotheekwet, *B.S.*, 22 December 1851, arts. 7 & 8 and BCCP, art. 1386; Netherlands: DCCP, art. 430 para 1; Germany: ZPO, § 894. Under English law, there is no concept of an enforceable title as such. Mortgages are enforced by an action *in rem*.

II. Court System

Given the high complexity of international maritime cases and enforcement matters, the installation of a specialised chamber or division in certain courts could lead to a more efficient conclusion of a maritime case or a sale procedure. In England the specialised Admiralty Court that is part of the high court of England and Wales has long-established expertise in complex maritime matters and is moreover the competent court for ordering a judicial sale of a ship.[31] The English Admiralty Marshal also plays a key role in executing the decisions of the Court while offering specialised assistance in bringing the sale to a good end. Due to their specialisation, the Admiralty Court is usually more costly than courts in continental Europe. However the difference in costs might be leveled out by the expediency of a specialised Admiralty Court. When considering further that the language of civil proceedings in England is English, the *lingua franca* of the international shipping industry, translating costs and resulting time-loss will be kept to a minimum.

Different from the English system, the Dutch Code of Procedure does not provide for a separate court to deal with maritime cases in general. Nonetheless, the District Court of Rotterdam *de facto* has a so-called 'wet-chamber',[32] where specialised judges decide on shipping cases, including arrest and judicial sale, on a daily basis.[33] The international commercial importance of the port of Rotterdam and its related businesses lie at the basis for the *de facto* formation of this specialised judiciary for settling disputes in this distinct area of law.[34] This serves to avoid that courts which are rather unfamiliar with the shipping business have to decide on complex maritime matters. Not having any specialised court or chamber dealing with maritime (enforcement) matters, as is the case in Belgium,[35] could moreover considerably slow down procedures.[36] Given however that this specialised 'wet chamber' is not regulated by Dutch law, it is not completely clear when a case ends up in the hands of a maritime legal expert and whether there will be experts available when a case is appealed.[37] A further development of

[31] CPR 61.2(1).

[32] In Dutch called the 'natte kamer'.

[33] T. Havinga & A. Jettinghoff et al., "het onderzoek 'specilisatie loont?! Ervaringen van grote ondernemingen met specialistische rechstraakvoorzienignen", Raad voor de rechtspraak (2010), 51–52. available at http://www.rechtspraak.nl/gerechten/Rvdr, last visited on 20.01.2014. Arrest and execution fall under "wet shipping".

[34] T. Havinga & A. Jettinghoff et al., "het onderzoek 'specilisatie loont?! Ervaringen van grote ondernemingen met specialistische rechstraakvoorzienignen", Raad voor de rechtspraak (2010), 51–52. available at http://www.rechtspraak.nl/gerechten/Rvdr, last visited on 20.01.2014.

[35] In Belgium, for example, maritime cases are dealt with by the Commercial Court and judicial sales take place under the supervision of the judge of seizure.

[36] See therefore Commission voor Maritiem recht, tiende Blauwboek over de herziening van het Belgisch scheepsvaartrecht, Proeve van belgisch scheepsvaartwetboek (privaatrecht), 2012, p 274.

[37] The Court of Appeal of the Hague hears appeals lodged by the Rotterdam District Court. See also T. Havinga & A. Jettinghoff et al., "het onderzoek 'specialisatie loont?! Ervaringen van grote ondernemingen met specilistische rechstraakvoorzienignen", Raad voor de rechtspraak (2010), 94.

this specialised chamber will very likely strengthen the position of the Netherlands as a *forum* for dealing with maritime cases in general and judicial sales of ships in particular. Contrary to Belgian law,[38] the Dutch laws are rather tolerant when it comes to the use of English documents during court proceedings, which is often advantageous when dealing with maritime cases and enforcement matters.[39]

When it comes to the method of service of court documents, all the three jurisdictions are subject to the the Hague Service Convention and the 2007 Service Regulation. For a large part, therefore, the rules in connection to the *method* of service within the context of the aforementioned instruments is to a large extent harmonised. When domestic rules apply, the national reports show that in some states such as in Belgium in the Netherlands, there is an option to serve documents on the public prosecutor directly, when service abroad is necessary and no address is known.[40] There is no such option in England.[41] This so-called 'remise au parquet' might—to the advantage of the creditor—save time, but might also put the rights of defence at risk. Besides this important difference in the method of service, all three discussed jurisdictions have the possibility in some important occasions during the judicial sale procedure to have documents directly served on the ship or the master or crew present on the ship, which could save a considerable amount of time.[42]

III. Methods of Judicial Sale and Alternatives

The national reports established that the different jurisdictions developed their proper system of sale. Some prove to be very efficient and safeguard all interests while others seem to be very time-consuming and formalistic. In what follows, this part will firstly compare the different ways of bidding after which a discussion will take place considering the diverse mechanisms states have developed to secure a fair sale price.

[38] Cf. Chapter 3, Belgium. The strict view come with the Wet van 15 juni 1935 op het gebruik der talen in gerechtszaken, *BS,* 22 June 1935.

[39] Cf. Chapter 3, Belgium, I, 3 and Chapter 4, the Netherlands, I, 3.

[40] Cf. BCCP, art. 40 para 2 and DCCP, art. 54 para 2 &4.

[41] Cf. CPR, rule 6.9.

[42] Compare DCCP, art. 565 para 4 juncto Book 8, art. 260. (service of executory arrest) BCCP, art. 1547 para 2 & 3 (service of command for payment and executory arrest) PD 61 para 3.6 (1) (claim *in rem* can be served on the vessel against which the claim is brought).

1. Court Auction vs. Sealed Bids

All three discussed jurisdictions in this research apply a different way of bidding, which could possibly influence the outcome of the sale. In England, the bids can be given by sealed tender, which makes it easier for overseas interested purchasers to participate in the judicial sale. The more numerous the interested parties, the greater the chance a higher bid is given. This is quite different from the Belgian system, where the bidding is done by hand-raising which as a matter of course requires the physical presence of the potential purchasers or their representatives.[43] Usually, an experienced specialised lawyer or another appointed representative will be hired to participate in the bidding process. The foreign purchaser might however experience difficulties finding this specialised experience in the state where the ship is auctioned. A sale by tender would make the process as a whole more accessible and less complex. Therefore, bidding by sealed tender, contrary to bidding by hand-raising as known in Belgium,[44] is arguably a more appropriate form which potentially increases potential purchasers and thus the sale price. However, the disadvantage of the sealed bidding method is that a bidder cannot raise his bid any more after getting knowledge of a competitor's bid. Potentially, this might result in a diminished sale price. Although the Netherlands does not have a system of sealed bids, creditors experience this jurisdiction as having an efficient and reliable auction method securing satisfactory sale prices.[45] The Dutch judicial sale consists of two phases, all taking place on the same day. During the first phase, interested parties can tender increased bids, starting from a minimum price creditors have agreed on.[46] The highest bidder obtains the vessel, unless a higher bid is given in the second session taking place after a short break. During this session the auctioneer starts with a high asking price that is lowered until someone closes the sale by making the requested offer. This person acquires the ship, in accordance with the conditions of sale. The Dutch auction is, especially in comparison to the Belgian one, very quick, making it an ideal method for a public ship sale. Moreover, this auction method encourages competitive bidding, having a positive effect on the fund in the court, which in itself makes the method attractive for enforcing creditors.

[43] See Chapter 3, Belgium, IV for more on bidding by hand-raising.

[44] According to Belgian custom, the sale will be conducted by hand-raising. There are no known cases where the court decided to use another method of bidding.

[45] M. Quade & S.P. Rindfleisch, 'Arrest und Zwangsversteigerung' in: H. Winter & C. Henning et al (eds.), *Grundlagen der Schiffsfinanzierung* [Frankfurt, 2008] 809–857, 837.

[46] DCCP, art. 575 para 5.

2. Right of Higher Bid vs. Valuation

In order to secure a fair price, all discussed jurisdictions require proper advertisement of the sale and its conditions as a first requirement in order to attract sufficient potential purchasers.[47] Most jurisdictions also apply other mechanisms to maximise the sale returns.

In an attempt to reach a fair price for the sale, some jurisdictions such as Belgium, have enacted the right to place a higher bid after the first auction day. Creditors can however waive this right in the conditions of sale or on the first auction day.[48] However when this right is not waived, a second auction day has to be organised that can, at its earliest, take place 15 days after the first auction day.[49] Besides this extensive time loss, the right of entering a higher bid might cause that potential buyers only show up the second day, which could nullify the protection as envisaged by the Belgian Procedural Code. Of course, the right of creditors to have a second auction day is only infrequently exercised, certainly not when a bid in the first round has been found sufficient. However if the creditors cannot agree on whether or not to organise a second auction day, the court will decide on the matter and will very likely fall back on the right of a higher bid, which used to be a mandatory rule under the Belgian Procedural Code.[50] Creditors preferring a fast sale procedure without incurring the threat of a second auction day might rather turn to a jurisdiction with a more efficient method of sale while having mechanisms to assure that a reasonable price is obtained. Such a mechanism can be a pre-sale valuation of the ship, as is known in England. There, the highest bid has to be equal to or above the valuation price before a sale is concluded.[51] However, this system can also cause a loss of time if the bids were below the purchase price, after which the claimant who obtained the sale order can decide whether to accept the bid below the required level[52]—which would result in a loss of money—or to have a second auction day organised, which is a more time-consuming route not holding any assurance that the second sale round will result in a higher price. Although a valuation and a minimum price is a good mechanism for realising a fair price, it can also be very costly. Considering that one experienced broker might ask between € 5000 and 20,000 for a full-fledged valuation including physical appraisal of the vessel, a ship appraisement by one or more valuators might be a burden for

[47] Compare for example BCCP, art. 1554 and DCCP, art. 571 and CPR rule 61.10 (2).

[48] BCCP, art. 1556 para 1, juncto 1592, para 6. The option of the claimants to exclude the right of a higher bid was newly enacted in 2009. Before that the right of a higher bid was a mandatory rule from which the creditors could not deviate.

[49] BCCP, art. 1556 para 1.

[50] Ibid., art. 1556 para 1, juncto former art. 1592 para 1.

[51] The Silia [1981] 2 *Lloyd's Rep*. 534, 535.

[52] The Silia [1981] 2 *Lloyd's Rep*. 534, Ibid., 534.

claimants.[53] Unlike the English system, both Dutch law[54] and German law[55] do not require a mandatory pre-sale valuation. For German ships, however, the German Auction Act provides for a set of rules affirming that a minimum offer should at least be able to cover the costs of the judicial sale and the value of the prioritised claims.[56]

3. Court-Approved Private Sale[57]

Notwithstanding the various differences in procedure between jurisdictions, the national reports evidence that a judicial sale of a ship often remains a lengthy process entailing various unnecessary costs. During the last years, some jurisdictions therefore developed an alternative method that qualifies as an auction in that the ship is sold free of all charges. The court-approved private sale, also referred to as a 'hybrid sale' or the 'fast track' procedure, is a sale by private contract whereby a creditor, usually the mortgage bank, can file a petition to the court to approve a private sale to a specific buyer for a certain price. This type of court-approved private sale, not to be confused with a private sale taking place without the involvement of a court,[58] will considerably speed up the procedure and produce a title free and clear of all encumbrances while avoiding the usually depressed purchase prices obtained in an ordinary judicial sale. Although it might seem unlikely in difficult economic times to find a purchaser willing to purchase the vessel at a price that is most likely higher than the judicial sale price otherwise obtained, prospective buyers often consider a hybrid sale as the mortgagee will typically again finance the purchased ship.[59] In order to avoid the disadvantages of

[53] Interview with S. Albertijn, Global head of risk management ADM/Toepfer, Non-executive Director at Baltic Exchange Ltd, Guest lecturer on ship finance, University of Hamburg.

[54] However, in practice the first phase of the auction starts with the minimum price as agreed between enforcing creditors.

[55] Gesetz über die Zwangsversteigerung und die Zwangsverwaltung in der im Bundesgesetzblatt Teil III, Gliederungsnummer 310-14, veröffentlichten bereinigten Fassung, 24.03.1897, § 171 (4). Hereinafter referred to as Gesetz über die Zwangsversteigerung.

[56] Gesetz über die Zwangsversteigerung, § 44.

[57] This is largely based on the practical experience the author gained while working in the ship finance section of a commercial bank.

[58] The mortgagee bank would normally have the right to sell the ship privately in case of default by the ship-owner, on the basis of the financing contract. However, such a procedure has considerable disadvantages. A major disadvantage of such a sale is that it fails to produce a clean title which means that the mortgage bank will have to indemnify the buyer for any pre-sale claims. Furthermore, the mortgage bank involved in this type of sale will be held liable in the event the price is found to be unreasonably low.

[59] Having a ship financed during times of global recession is for its part not evident. On the rare occasion that the prospective buyer does not obtain further vessel finance, he might rather wait for the auction day and purchase the ship for a reduced price.

an ordinary sale, interested parties might leave open the possibility to accomplish a court-approved private sale and might direct the ship to a jurisdiction having an established practice on this kind of procedure. Notwithstanding the fact that this procedure is non-existent in most jurisdictions, the availability of such alternative method of sale might play a significant role in the procedural attractiveness of a *forum*. This research will offer a brief discussion of his alternative approach and discuss the recent practice of this method of sale.

From the discussed jurisdictions, the Netherlands presently offers the possibility of mortgagees to conclude a sale of a ship to a third party, with approval of the court, free and clear of all encumbrances. Although there is no specific provision in the DCCP regulating a private sale of a ship within an auction, Dutch courts have allowed these kinds of sales pursuant to art. 3:268 DCC and art. 548 DCCP[60] on a consistent base.[61] In doing so the Netherlands leaves open the possibility for the mortgagee to file a petition with the court to approve a private sale, during the course of an ordinary judicial sale procedure. In order to file such a request, the mortgagee has to submit to the court, ultimately a week before the planned sale,[62] the agreement between the seller and the buyer, often referred to as the memorandum of agreement.[63] Additionally, a list of all interested parties[64] has to be provided together with a list of any further bids received.[65] According to Dutch practice, the court assesses during interlocutory proceedings the information received and will decide whether there are any grounds arguing against the approval of the sale. The court can, but does not necessarily have to, request a shipbroker to complete an additional valuation of the vessel before approving the private sale. If there is a higher bid available the court can deny the approval of the purchase contract, on which occasion it will reschedule a new auction day and advertise according to the ordinary judicial sale rules.[66] Although the Dutch Procedural Code does not explicitly mention that the consequences of a court-approved private sale are entirely the same as an ordinary judicial sale, recent case law on the matter permitted a private sale in conformity with the purchase agreement, which usually includes a provision stating that the vessel is purchased free of all encumbrances.[67] In the event that the court allows the court-approved private sale, the public auction is entirely replaced by the court order, which concludes the private sale. For the

[60] Both provisions are applicable on the execution of immovable property in general.

[61] Hof, s-Gravenhage, 19 December 1995, *S&S* 1996/34 ('All-Ways') where the contradiction between article 579 DCCP and art. 3 para 2 DCC is solved; Vrz. Rechter, Rechtbank Rotterdam, 29 April 2009, *S&S* 2009/122. ('Hannes C.').

[62] DCCP, art. 548 para 1.

[63] Ibid., art. 548 para 2.

[64] This comprising those registered in the relevant ship registry or those who have placed an arrest on the vessel.

[65] DCCP, art. 548 para 3.

[66] Ibid., art. 548 para 4.

[67] Vrz. Rechter, Rechtbank Rotterdam, 29 April 2009, S&S 2009/122. ('Hannes C.'). Hof, s-Gravenhage, 19 December 1995, S&S 1996/34 ('All-Ways').

sake of completeness, the court usually additionally mentions that its court order has the same consequences as a judicial sale judgment as referred to in arts. 571–575 DCCP, selling the vessel free and clear of all encumbrances. When the buyer has fulfilled his obligations under the purchase contract, the court will release the court-ordered adjudication and the court minutes, making the sale official. Subsequently, the payout and the determination of priorities will follow, consistent with an ordinary judicial sale procedure. The question whether the foreign ship registry will recognise this alternative method of sale and de-register the ship will usually be decided on a case-by-case basis by the foreign administrative authorities.

Unlike the Netherlands, there is no existing case law in Belgium regarding the possibility to sell a ship through private agreement within an auction procedure. Also, the rules relating to the judicial sale of a ship through a public auction do not incorporate the regime on the private sale of immovable property,[68] which results in the fact that there is not any law nor any case law permitting the mortgagee to sell the ship privately within the auction procedure. It may very well be that if a new Belgian Maritime Code comes into force which includes the necessary amendments to the Procedural Code, the possibility for such a court-approved private sale will be expressly mentioned.[69] Besides the Netherlands, also England & Wales are acquainted with this method of sale as an alternative to the ordinary judicial sale and, moreover, sale by private contract. Recent English case law however evidences some doubts as to this third alternative method of sale.[70] In the recent *"Union Gold"* case, the mortgage bank applied to the court for an order to sell four ships to designated buyers at a named price on a *pendente lite* basis, instead of selling the ships to the highest bidder through an ordinary auction process. In its application for a private sale order, the bank provided the court with several valuations of experienced brokers. These valuations evidenced that the sale offer for three of the four vessels was in excess of the value of the vessel while the offer on the fourth vessel was in a low range but still within the range of valuations. Notwithstanding the seemingly fair sale offer, the Court refused to approve the private sale for three of the four ships, stating that questions related to valuation should be dealt with by the Admiralty Marshal in a judicial sale procedure and not by the court. With an emphasis on the protection of the ship-owner and other claimants, the court ruled that only special circumstances justify a court order to sell the ship to a direct buyer without appraisement.[71] In the first place, the court argued that the brokers' valuations were not the procedural equivalent of an appraisement of the ship by the Marshal, who can best deal with the complexities

[68] BCCP, art. 1580ter.

[69] See on this point Blauwboek Proeve van Belgisch Scheepsvaartwetboek Privaatrecht, Blauwboek 10 scheepsvaartprocesrecht, para 3.308.

[70] Bank of Scotland plc v The owners of the MV "Union Gold" [2013] *EWHC* 1696 (Admiralty Court), abstract available at [2013] 878 *Lloyd's Maritime Newsletter* 1.

[71] Bank of Scotland plc v The owners of the MV "Union Gold" [2013] *EWHC* 1696 (Admiralty Court), abstract available at [2013] 878 *Lloyd's Maritime Newsletter* 1.; Bank of Scotland plc v The owners of the MV "Union Gold", owners of the M/V "Union Silver", owners of M/V "Union Emerald" and the owners of the M/V "Union Pluto" *Lloyd's Rep*. 53.

of a forced sale.[72] The court indicated that the sale through a Marshal will assure that a fair price is reached, taking into consideration that the vessel is sold free and clear of encumbrances, which usually compensates for the devaluation of a ship when promptly sold through an auction.[73] In this case, it was not entirely clear whether the brokers in their valuations took into consideration that the Marshall can confer a title free and clear of all encumbrances, an element that might very likely increase the value of the ship.[74] Secondly, the bank filing a petition to the court seeking approval of the proposed sale would make the appraisement public to potential purchasers, which might result in an inferior purchase price. Thirdly, the court found that the best possible price will only be reached when the sale is advertised and when potential purchasers are invited to bid on the vessel. With a sale by private agreement, the market is not 'tested' by advertisement and invitations to bid before a final price for the ships is concluded.[75] For all these reasons, the court suggested that an order to sell the ship to the bank's buyer "was not well designed to obtain the best possible price" and decided therefore not to approve this practice as a general rule.[76] The court found however that 'special circumstances' pertaining to the proposed sale of the fourth vessel justified a court-approved private sale. The fourth ship in question was an older small commercial ship against which the bank had a claim of ca. EUR 13.5 million, an amount that extensively exceeded the value of the ship. It was very likely that this ship would lose its business if it was not sold promptly through the proposed fast-track procedure. Therefore, the court granted the bank's application to sell the fourth vessel to a named buyer at a named price. The court concluded that it could only retain its impartiality in hard enforcement cases if questions of valuation and sale are in principle left to the English Admiralty Marshall and that only exceptional circumstances, such as found in the case of the fourth vessel, can justify the court's approval of a private sale. This decision is in line with what the Hong Kong admiralty judge decided in the *Margo L* case (1997).[77] There, the judge declined to approve the direct sale, stating that the sale by public tender is the method that in normal circumstances realises the best possible price. Only 'powerful special features' can justify a sale by private contract, but this method should not be used on a consistent basis. Also the Singapore Court, following the "*Union Gold*"

[72] Bank of Scotland plc v The owners of the MV "Union Gold" [2013] *EWHC* 1696 (Admiralty Court), abstract available at [2013] 878 *Lloyd's Maritime Newsletter* 1.

[73] Alpstream AG & Ors v PK Airfinance Sarl & Anr [2013] *EWHC* 2370 (Comm), para 66, where it was stated that a forced sale usually depresses the ship's value by 20 %.

[74] Bank of Scotland plc v The owners of the MV "Union Gold" [2013] *EWHC* 1696 (Admiralty Court), abstract available at [2013] 878 *Lloyd's Maritime Newsletter* 1.

[75] Ibid.

[76] Ibid.; Bank of Scotland plc v The owners of the MV "Union Gold", owners of the M/V "Union Silver", owners of M/V "Union Emerald" and the owners of the M/V "Union Pluto", *Lloyd's Rep*. 53.

[77] Den Norske Bank ASA v Owners of the ship "Margo L" *[1997]* HKEC 767 as referred to in The *"Turtle Bay"* [2013] SGHC 165, 30 August 2013, para 16 abstract available at *Lloyd's Maritime Law Newsletter* [2013] 887, para 16.

judgment, has made it more difficult to obtain an order for a private direct sale of a vessel as an admiralty sale.[78] The judge stated that the direct private sale reflects the interests of only one claimant, the mortgagee, and that it would in principle be wrong for the court not to protect the rights of other claimants.[79] The judicial sale is designed in order to protect the rights of all parties involved and to obtain the best possible price for the asset. In turn, for all mandatory procedural steps such as valuation and advertisement, the purchaser can obtain a clean title. The Singapore Court found that it would violate the rights of other claimants if the mortgagee benefits from the advantages of the ordinary judicial sale without respecting the obligations that come with such a court sale. Unless there are 'special circumstances' or 'powerful special features', the court will not grant an application for a direct sale of an arrested ship.[80]

The current question is whether Gibraltar, known as one of the more popular arrest and judicial sale *fora*, will follow the English court's view. Gibraltar's admiralty law and practice is deeply rooted in English law, which might be a reason why the court would follow the view of the English court in the "*Union Gold*" judgment. However, the characteristic effectiveness and procedural pragmatism and flexibility of Gibraltar's admiralty court might bring the court to another solution that circumvents the potential risks that come with the procedure as mentioned in English case law.[81] Notwithstanding the controversy around this alternative method of sale, some states such as Malta have embraced this system and explicitly enacted the possibility for a court to approve a private sale. Since 2006, art. 359 of the Maltese Code of Civil Procedure provides a complete framework of the procedural requirements necessary for completing a hybrid sale of a ship.[82] In addition to its formal application for a court-approved sale, the bank has as well to submit appraisements by two independent and reputable brokers together with proof that the sale price is reasonable and that the private sale is conducted in the interest of all parties involved. Known creditors and interested parties should moreover be notified about the sale taking place. Once the pre-order conditions are fulfilled, the court can make arrangements to organise a hearing that has to take place within 10 days of the filing of the application. During this hearing, the court is mainly concerned with assessing the reasonableness of the sale price and examining whether all rights of other creditors are respected. If the court accedes to the application, it will appoint a curator who will transfer the ship to the purchaser in accordance with the court-approved terms and conditions as agreed between the seller and the buyer. Article 359 in the Maltese Procedural Code also mentions that upon payment of the sale price, the purchaser will receive an

[78] The "Turtle Bay" [2013] SGHC 165, High Court of Singapore, Belinda Ang Saw Ean J., para 33–38.

[79] Ibid., para 33.

[80] Ibid., para 35.

[81] They might introduce, for example, the requirement of a separate valuation by the court.

[82] Code of Organisation and Civil Procedure Act (Cap. 12), Government Gazette, Supplement, 1992-12-11, art. 359.

unencumbered title over the ship. As with a judicial sale, the claims on the ship are offset against the proceeds of the sale, after which a payout in line with the (choice-of-law) rules on priority occurs. If all documents are submitted in time,[83] the private sale procedure in Malta will take approximately 3 weeks, running from the date of application to the date of the order which makes the forum very attractive for mortgagees.[84]

The court-approved private sale was developed as an alternative method to avoid the negative effects of, on the one hand, private sales[85] and, on the other, judicial sales.[86] The alternative procedure combines the relatively short timeframe of the private sale with the free and unencumbered title obtained after a judicial sale. Notwithstanding the advantages, there are some courts that have some doubts as to the direct sale price. However, these uncertainties, as expressed mainly by common law courts, can be readily circumvented if courts organise a separate valuation where there is doubt as to whether a reasonably fair price has been agreed between the parties. When the proposed sale price is far below what the court has valuated, the court could refuse to order the private sale. Furthermore, the courts have to realise that a judicial sale is not always, certainly considering the necessary time and various procedural hurdles, the procedure that leads to the best available price. Taking also into account that the mortgagee usually holds a high-ranking claim that exceeds the sale price, it is often not opportune and necessary to go through an auction in order to 'protect the interests of all parties'. Therefore the availability of such method can have an influence on the attractiveness of a certain *forum* in case of an irreversible default situation.

The disadvantages that come with the court-approved private sale are mainly connected to the lack of existing practice concerning this type of remedy. Due to the fact that the concept of such a sale is not yet fully known outside the banking world, potential purchasers initially agree with a hybrid sale without fully knowing the consequences on the sale price. In times of crisis, it might in fact be more favourable for an interested buyer to wait for a judicial sale rather than to have the sale court-approved. After consulting their lawyers, these potential purchasers often decide to revoke the private sale, which might be to the detriment of the mortgage bank, consuming time and thereby incurring more costs. Another disadvantage resulting from the fact that a hybrid sale is not common practice in most

[83] Maltese law does not have the option for a sale *pendente lite*, instead requiring an enforceable title. Code of Organisation and Civil Procedure Act (Cap. 12), Government Gazette, Supplement, 1992-12-11, A373-A378, art. 358.

[84] Adding to the possibility of a hybrid sale the fact that all registered mortgages, foreign or not, constitute an executory title under Maltese law, the time needed before a sale can be initiated is hereby considerably reduced. See on this point Merchant Shipping Act (Cap. 234), Government Gazette, Supplement, 1973-04-06, art. 49 and 42 (2) juncto Code of Organisation and Civil Procedure Act (Cap. 12), Government Gazette, Supplement, 1992-12-11, No. 15, 690, A373-A378, art 253.

[85] With a private sale, no free and unencumbered title is obtained.

[86] The judicial sale process is relatively slow, and the vessel price during a distress sale is usually low.

jurisdictions arises only after the sale is completed, in the event the sale has to be recognised abroad. The foreign recognition of a judgment or order on the approval of a private sale,[87] having the same effects as a judicial sale, might cause increasing recognition problems, certainly when there is doubt as to whether all rights of the parties involved were respected.

IV. Payout

After a ship is sold by means of a judicial sale and the sale fund is deemed insufficient to satisfy all the claims, the court has to determine how the fund will be distributed among the creditors. Due to the lack of interests in unifying the law of priorities,[88] each state has developed its own ranking, which forms a source of considerable uncertainty: depending on the jurisdiction in which the ship is sold, a claimant can in fact achieve a different outcome with regard to recovering his claim. This uncertainty is even more complicated by the question of what law governs the existence and ranking of foreign claims. In respect of foreign liens in particular, which are the competitors of the mortgagee, the applicable national conflict-of-law rules as discussed in the national reports seem to differ radically from each other, typically having an impact on how favourable a *forum* in fact is for the enforcing creditor. Therefore, this chapter, after comparing the diverse rankings of claims as discussed in the national reports and as exemplified by other jurisdictions, will address the different conflict-of-law approaches as to the existence and ranking of foreign rights.[89]

1. The Domestic Order of Ranking

Once the ship is sold, all the claims,[90] against the ship are transferred to the sale proceeds, after which the fund will be distributed.[91] The order of ranking will affect

[87] The memorandum of agreement (MOA) underlying the court-approved private sale is merely an agreement between seller and buyer about filing a petition with a court for an order that a certain ship is sold to the buyer under certain conditions as specified the memorandum. This means that when foreign recognition is necessary, the order/judgment deciding on the sale, rather than the MOA, is the underlying document which has to be recognised.

[88] See Chapter 2.

[89] For more on *forum* shopping by mortgagees specifically: see S. Hillebrandt, *Forum shopping des Gläubigers im Rahmen der Zwangsvollstreckung: Mißbräuchliches Verhalten oder zu billigende Interessenwahrnehmung?* [Aachen, 2001].

[90] Whether a right is recognised and has the same effects in the legal order of the state where the sale took place will be subject to the conflict-of-law rules of the executing *forum*. See following subchapter.

[91] In practice, the mortgage bank usually proposes a distribution plan to the prioritised creditors, who will, upon agreement, be paid out by the mortgagee so the latter is the only one involved in the

all parties involved in the payout and it is therefore essential to strike a fair balance between the interests of the ship financing sector and other stakeholders. Some states tend to create more categories of prioritised claims than others, which has an effect on the attractiveness of *forum*. From the discussed states, Belgium, which incorporated the 1926 Convention on mortgage and liens into its domestic law, opted to recognise a wide category of maritime liens, which might in fact threaten the viability of the mortgage security but which is to the advantage of lien holders. By allowing more prioritised debts, Belgium gives a lower priority to ship mortgagees which could potentially diminish the attractiveness of the forum and the flag for those holding a mortgage.[92] In England by contrast, the court has a quite broad discretionary power to determine the order of priorities on the basis of equity, public policy and commercial expediency with the "ultimate aim of doing that which is just in the circumstances of each case".[93] This might also have a negative effect: the enforcing creditor might not be entirely sure which claims will be granted priority over other claims. The English *prima facie* ranking order that has developed over the years through case law does not, unlike Belgian law, prioritise claims for necessaries[94] such as bunkers, supplies, repairs and towage provided to the ship during arrest nor does it grant priority for contributions of the ship in general average and for damage to cargo.[95] This system of priority implies for example that bunker suppliers might be quite hesitant to sell bunkers to an arrested vessel if they are not sure whether their claim is prioritised or not. With Belgium having prioritised claims which are unknown to English law, a conflict-of-law problem can arise when an English court is adjudicating on the sale fund.[96] Although the Netherlands, having its system based on the 1965 Convention on the registration of inland navigation vessels,[97] does prioritise claims for necessaries and general average contributions just as Belgium, it provided the mortgagee with a very favourable ranking by placing the damage to cargo, persons and port infrastructure behind the mortgagee, and it does not give priority to pilotage dues or claims for wreck removal. Although crew wages and emoluments form an advantageous secondary priority charge against the sale proceeds,[98] Dutch law restricts the claims by the master and crew of a vessel pursuant to their employment contract

payout process before the court. As the bank proposes this type of agreement only to creditors who will be prioritised, the domestic ranking of claims remains an important feature.

[92] The attractiveness of the flag might be affected when through a foreign court's conflict-of-law rules the maritime liens under Belgian law are recognised.

[93] The Ruta [2000] 1 *Lloyd's Rep*. 359.

[94] The Heinrich Bjorn (1886) 11 *Appeal Cases*. 270 (HL). See also D.C. Jackson, *Enforcement of maritime claims* [London, 2013] 31, ft. 23.

[95] These claims constitute a statutory right *in rem*.

[96] See following subchapter.

[97] Convention on the registration of inland navigation vessels, Geneva, 25 January 1965, *UNTS*, Vol. 1281, p. 111.

[98] In England, these claims are usually ranked after salvage claims and claims for damage done by the ship.

to a maximum of the sum payable over a period of 12 months and does not include, different from the English and Belgian regime, the social insurance contributions and master disbursements. Also German law recognises fewer priorities than the Belgian priority rules by ranking master disbursements and claims for cargo damage after the mortgage.[99] The American system, unlike any other system in the world, recognises a plethora of liens, including a claim from a shipyard which arose before the arrest phase.[100] It is seemingly the American approach that causes the international discussion on recognition of maritime liens.[101] When a ship is engaged in trade with the USA and undergoes maintenance there, it might be wise for the mortgagee to avoid arresting the ship in that very country or in a country that gives effect to rights which arose in the USA,[102] as it might give rise to various maritime liens taking priority over his claim. In all discussed jurisdictions it is not unimportant to note that the port dues enjoy a prioritised status over the mortgage.[103] Considering the high port dues[104] for ships lying in the harbour awaiting a judicial sale, creditors have an extra incentive to push for an early dispute resolution or sale of the ship and to choose a jurisdiction with an efficient sale system.

From the foregoing it becomes clear that different jurisdictions attach different consequences to the same type of claim which, in its turn, becomes a source of various conflict-of-law problems when the fund is distributed to the various creditors. The enforcing claimant's choice of the 'appropriate' forum to sell a ship will thus not only depend on the pre-sale and sale procedure itself but can also be influenced by the crucial post-sale phase.

2. Conflict-of-Law Approaches

Due to the extensive international nature of shipping, various foreign claims can arise during ships' voyages. With regard to foreign mortgages, it is generally accepted that the *lex registrationis* decides on the existence of a foreign

[99] HGB, § 596. Germany decided to sign the Mortgages and Liens Convention of 1967 and transposed the provisions of this Convention into its domestic law.

[100] Commercial Instruments & Maritime Liens Act of 1989, Public Law No. 100–710, 102 Stat. 4735, 23.11.1988.

[101] B. Schmidt-Vollmer, *Schiffsgläubigerrechte und ihre Geltendmachung; eine rechtsvergleichende Darstellung unter Berücksichtigung des deutschen, englischen, US-amerikanischen und niederländischen Rechts* [Hamburg, 2003] 159.

[102] See next subchapter on conflict-of-law approaches.

[103] In the Netherlands this was different until 2003: port dues were not given priority.

[104] The average port dues for a panamax bulk carrier in the port of Ghent will cost ca. 5500 $/Day; port of Rotterdam 7500$/day; Hamburg 3000$/day. (this figure is based on the historical port costs from a large German grain trader).

mortgage,[105] whereas the law applicable to the recognition and ranking of a foreign maritime lien is not that straightforward. Often, problems arise if a privileged right that has lawfully been created abroad does not enjoy such privileged status under the *lex executionis*.[106] It is therefore imperative for the enforcing creditor to carefully assess the applicable conflict-of-law rules of the potential *forum arresti* in order to know whether this jurisdiction gives effect to foreign liens, even if such a claim would not enjoy such status in the arresting state's domestic ranking. By choosing the jurisdiction with a certain approach towards the applicable law, a maritime lien acquired abroad could very well be accorded its full weight or could be cast off.

The law to be applied to the recognition and ranking of foreign maritime liens depends largely on whether the jurisdiction characterises these issues as being matters of substance, subject to the applicable conflict-of-law rule or as being purely matters of procedure, calling for the *lex fori*.[107] States tend to draw the line between substance and procedure differently, which makes the universally accepted rule of "*forum regit processum*" (the procedure is governed by the *lex fori*) not very informative for claimants as it leaves open the question as to which issues are procedural. Some jurisdictions tend to have a wide view on what constitutes a procedural matter, assigning a rather restricted role to foreign law, while others have a narrow concept of procedure, regarding a lien as a substantial right. The national reports have already shown a fragmented approach towards the applicable choice-of-law rules when it comes to the recognition and ranking of foreign priority rights. In Belgium, for example, the *lex registrationis*, the law of the registry or flag, governs the question of the ranking of a maritime lien.[108] Belgium accordingly considers the foreign maritime lien and its ranking to be a matter of substance rather than one of procedure. An advantage of this system might be that all the creditors can in principle know the ranking of their claim, which would ideally avoid that the qualification and ranking of a certain claim depends on the forum.[109] It might give the financing bank in particular the advantage of knowing how far its security is

[105] See national reports. For a general overview see S.M. Carbone, 'Conflits de lois en droit maritime' in 340 *Recueil des cours* [Leiden & Boston, 2010] 63–270, p 253. See also International institute for the unification of private law (UNIDROIT), Item No. 5 International Interests in Mobile Equipment in preparation of other Protocols to the Cape Town Convention, 2013, C.D. (92) 5 (c)/(d), March 2013, p 17. Available at http://www.unidroit.org/ under council documents, last visited 23.03.2013.

[106] The applicable conflict-of-law rule determining which law will decide on whether the privilege was lawfully created also varies from state to state: in Belgium the *lex registrationis* decides whether a claim is lawful; in the Netherlands it is the *lex causae* and in England the *lex fori* is applicable.

[107] For more on characterisation see M. Bogdan, *Recueil des cours,* Vol. 348, 2010, p 166. 134–157.

[108] BCIPL, art. 89.

[109] V.R. Abou-Nigm, T*he arrest of ships in private international law* [Oxford, 2011] 148. See also W. Van der Velde, *De positie van het zeeschip in het internationaal privaatrecht* [Groningen, 2006] 139–140.

protected and what position its claim has when a judicial sale is in sight. Considering, however, the fact that the Netherlands and England have a different conflict-of-law approach restricting the recognition of foreign liens and have on top of that a more convenient ranking system for mortgagees,[110] it is evident that the mortgagee, in seeking to avoid that foreign rights are prioritised, will prefer the Netherlands or England over the perhaps more predictable Belgian jurisdiction. Additionally, the predictability of the position of claims in the Belgian system can be significantly affected if the ship has changed its registry.[111] This might in fact further complicate the question of the applicable law governing the foreign rights. A quick distribution of funds, which is essential for all creditors, is moreover not enhanced by the application of the *lex registrationis*, obliging the *forum arresti* to acquaint itself with the law of registry in order to ascertain a correct interpretation and qualification of the foreign right. This can be a rather challenging exercise if the law of the registry is not well-developed or does not have established case law on the matter. Given the fact that the "genuine link"[112] between the flag and the owner or operator is often hard to find, the argument for the *lex registrationis* being the law which has the strongest connection in the case does not hold water either.[113] For all these reasons, a *forum* applying the law of the ship registry or flag to the recognition and priority of a foreign maritime lien might only be advantageous for the claimant holding a lien under the *lex registrationis* and possibly also for the mortgagee if the law of the registry does not have a proliferation of all kinds of maritime liens.

The Netherlands also applies the *lex registrationis* to the question of the recognition of a foreign lien and the consequences as to the ranking of the claim, but it has built in a two-pronged check by applying both the *lex causae* and the *lex fori* as to, respectively, the nature and ranking of the foreign claim: only if the claim is prioritised under the *lex causae* and if Dutch law ranks the claim before the mortgage, the claim will have full effect as a lien when the court distributes the fund. By applying the *lex fori*, the Netherlands protects the mortgagee against any foreign lien. Although the starting point for the ranking of claims in the Netherlands is the *lex registrationis*, the downside for the mortgagee of a pure application of the law of the flag is taken away, certainly considering that the Netherlands has a rather limited catalogue of claims ranking before the mortgage. Although the application

[110] See respective national reports.

[111] W. Tetley, 'Maritime liens in the conflict of laws' in: J.A.R. Nafziger & C. Symeon (eds.), *Law and Justice in a Multistate World: Essays in Honour of Arthur T. von Mehren* [Ardsley, 2002] 455. See also W. Van der Velde, *De positie van het zeeschip in het internationaal privaatrecht* [Groningen, 2006] 134–139.

[112] The "genuine link" between the flag state and the ship is a requirement in art. 91 the United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, *UNTS,* Vol. 1833, p. 3 Most jurisdictions are a party to this Convention; See also H. BOONK, *Zeerecht en IPR* [Deventer, 1998] 101.

[113] W. Tetley, *International conflicts of laws: common, civil and maritime* [Montreal & Blais, 1994] 175–224. See also V.R. Abou-Nigm, *The arrest of ships in private international law* [Oxford, 2011] 148.

of the *lex causae* might affect the creditors being able to rely on the *lex registrationis*, it has certainly an additional protection for the mortgagee in the event both the law of the *forum* and the registry prioritise a claim which does not enjoy such status under the law applicable to the contract or tort. However, the combination of both the *lex causae* and the *lex fori* as a dual check to the *lex registrationis* might considerably complicate the process of adjudication and increase the costs of foreign legal advice and might substantially slow down the distribution of the funds.

These problems are avoided under English law by applying the *lex fori* to both the recognition and the ranking of foreign maritime liens.[114] The conceptual explanation on which the *lex fori* rule is based is that under English law a lien is characterised as a procedural remedy rather than a rule of substance. Although this system is heavily criticised,[115] it is very much to the benefit of the mortgagee. If the latter has the choice of directing the ship to a jurisdiction appointing the *lex fori* to the distribution of funds, the payout will in any case be more predictable and efficient in such a jurisdiction given that a limited list of liens will have prioritised ranking under the domestic law. The limited number of liens outranking the mortgage combined with the application of the *lex fori* rule—which prevents the infiltration of foreign law and complicated legal questions—makes the English jurisdiction very attractive for mortgagees and herewith less attractive for those claimants holding a lien under the *lex registrationis*, given that is not recognised under English law.

Different from the discussed jurisdictions, Germany applies the *lex causae,* the law governing the merits of the claim, to determine whether the maritime claim is protected by a lien, whereas the ranking is in principle determined by the law of the location of the ship, here the *lex fori*.[116] When there is a closer connection to the law of another state, then the ranking is governed by that particular foreign law.[117] If a claim receives priority under the foreign law, the mortgagee's position can be significantly weakened.

Considering the different approach of states on effectively the same facts, it is essential for the claimant to enforce his claim in a jurisdiction that serves his interests best. When embarking on such an enforcement action, the enforcing creditor will carefully assess all forum shopping opportunities before directing a

[114] See for example *The Halcyon Isle* [1980] 2 *Lloyd's Rep*. 325.

[115] See for example V.R. Abou-Nigm, *The arrest of ships in private international law* [Oxford, 2011] 133, describing the characterisation of maritime liens as procedural as "an 'escape device' used to avoid the application of the governing law and to apply the law of the forum instead." See also W. Tetley, 'Maritime liens in the conflict of laws' in: J.A.R. Nafziger & C. Symeon (eds.), *Law and Justice in a Multistate World: Essays in Honour of Arthur T. von Mehren* [Ardsley, 2002] 451.

[116] Einführungsgesetz zum Bürgerlichen Gesetzbuche (BGBl. I S. 2494; 1997 I S. 1061), art. 45 (1) no. 2 hereinafter referred to as EGBGB.

[117] EGBGB, art. 46.

ship to a certain forum so as to obtain the best position in respect of the sale proceeds.[118]

V. Recognition

In view of the aforementioned differences in procedure between states and the different approach towards priority and the payout of claims, it is not unforeseeable that some creditors or even the dispossessed owner will be unsatisfied with the outcome of the sale and/or the recovery of their claims and will, thus, challenge the validity of the judicial sale and its effects when the ship calls at a port in another jurisdiction. The issue of recognition of the judicial sale decision could then be raised in a foreign court.

Although it is a well-established principle that after a judicial sale is finalised, the ship in question can be put back into business, free of all encumbrances, under general international law, nevertheless, a sovereign state cannot force another state or foreign administration to accept its rulings, reserving the authority to assign certain legal consequences of a foreign judicial sale in principle to each individual state.[119]

In what follows the research will, on the basis of the national reports, compare the position of the discussed states on the recognition of a foreign judicial sale and its effects. In conclusion this part will take a closer look at the negative effects of non-recognition and will shortly introduce one of the solutions to the problem, as further set out in Chapter 7 of this research.

1. Recognition of the Court Decision

A judicial sale is usually concluded with a formal decision or statement rendered by a court, in the form of a judgment or order, usually assigning the ship to the highest bidder, free from all charges. It is this specific decision and effect that can be subject to recognition, either in a specific application for recognition[120] or on an incidental basis.[121] The court before which the question of recognition arises will have to either apply applicable bilateral or multilateral instruments or, in the absence of the latter, apply their own domestic law and exercise the discretion it holds in order to recognise the foreign judicial sale.[122]

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[118] F.K. Juenger, *Choice of law and multistate justice* [Dordrecht, 1993] 162.

[119] For more about the implications of non-recognition: see infra Chapter 7.

[120] E.g. to obtain a deregistration.

[121] See national reports.

[122] M.N. Shaw, *International law* [Cambridge, 2008] 697–700.

Today, there are no successful mechanisms that achieve universal recognition of foreign judicial decisions. On the EU level, however, the recognition of judgments and authentic acts is governed by chapter III of the Brussels I Regulation,[123] and it seems to be very effective when the judicial sale and recognition takes place within the European framework.[124] Yet, one has to mention that recognition of a judicial sale of a ship likely takes place outside the European sphere, making the Regulation inapplicable and meaning that the recognising state will rely on its domestic recognition provisions.

From the discussed states, it seems that Belgium has enacted the most detailed system of recognition in its new Code of International Private Law. Finding its inspiration in the Brussels I Regulation, section 6 of the BCIPL sets out a comprehensive system on the recognition of foreign decisions. The Code provides for *de jure* recognition of foreign judgments, although at the same time the Code shows caution in recognising foreign non-European judgments by implementing numerous grounds for refusal of recognition.[125] To what extent the recognition of a foreign judicial sale judgment will take place and what the scope is for the grounds for refusal is impossible to predict as no challenges on this matter have arisen so far under the new Code. The precision of the provisions, though, and the fact that there is a clear framework for recognition offers more transparency to parties who rely on the foreign decision in order to block proceedings or to de- or (re)register the ship in the registry. In Germany, the grounds for non-recognition of foreign judgments decisions are carefully set out in §328 ZPO. The German ZPO prescribes that recognition might be ruled out if the foreign court did not have jurisdiction according to German law, if the certain service requirements were not met or if the decision contradicts any previous decision on the same matter.[126] In line with the Belgian law, the ZPO states that the decision will not be recognised if the court finds that it contradicts German public policy principles.[127] Different than the Belgian recognition rules, the ZPO rules out the recognition of foreign judgments if reciprocity by the state of origin has not been granted.[128] Contrary to Belgium and Germany, the Netherlands does not as a matter of law recognise any foreign judgment in the absence of a treaty[129] and did not include a general system of recognition for foreign decisions in its newly enacted book 10 on international private law. Like in England, the Netherlands has nonetheless developed specific case law on the matter,[130] respecting the foreign judicial sale and the clean title the court has given.

[123] See Chapter 2 of this research.
[124] Ibid.
[125] BCIPL, art. 25.
[126] ZPO, § 328, no. 1-3.
[127] ZPO, § 328, no. 4.
[128] Ibid., § 328 no. 5.
[129] DCCP, art 431.
[130] See for example Rechtbank Amsterdam, 7 May 2004, KG 04/912 *S&S* 2007, 108, 528-529.

Although the national reports evidence that recognition of a foreign judicial sale and effects might very likely be obtained, the absence of any international instrument and the discretion of the judge on the matter results in quite some uncertainty. The uncertainty of the recognition becomes even more visible when looking at the laws on recognition in states other than those discussed in the national reports. Some states explicitly set all sorts of requirements for recognition of a foreign judicial sale or have a very wide understanding of the public policy concept.[131] The mere fact that the judicial sale of the domestic registered ship takes place abroad can in some jurisdictions already constitute a violation of the public policy concept. This was the case in Turkey, where the Turkish Court of Cassation interpreted the art. 1245 of the former Turkish Commercial Code of 1956—which provided for the termination of encumbrances only in cases of a domestic forced sale—very strictly according to which pre-sale claims would not cease to exist if the vessel was subject to a judicial sale in a foreign state.[132] Due to this interpretation, foreign banks financing Turkish ship-owner reacted by opening discussion on the interpretation of art. 1245 of the Turkish Commercial Code. The legislator, on the initiative of the ship financing banks, revised the law on the recognition of foreign judicial sales in 2004[133] and changed it once again in 2012,[134] with the entry into force of the new Turkish Commercial Code. In the new Turkish Commercial Code, art. 1350 provides explicitly that foreign judicial sales of Turkish ships will have the effect of removing maritime liens and mortgages, on the condition that some (high) minimum standards are met.[135] These minimum requirements include a publication of

[131] CMI Questionnaire on the judicial sales of ships, CMI Yearbook 2010. Available at www.comitemaritime.org - > publications - > yearbooks. (last visited 09.06.2014).

[132] See Court of Cassation Decisions (Turkish language): 11. HD of 07/03/2002 (E.2001/10296, K. 2002/2338 (Kazanci Jurisprudence Data Bank) 11. HD of 27.7.2002 (E.2002/13000, K. 2002/15480) (Diaport Data Bank), 11. HD of 21.10.2004 (E. 2004/1033, K.2004/10103 (Diaport Data Bank) as referred to in D. Damar 'Neues türkisches Handels-und Transportrecht' in *Transportrecht,* 36(5), 178-191, 189, ftn. 137.

[133] By the law of 20/04/2004, Nr. 5136; RG Nr. 25446 of 28/04/2004 as referred to in D. Damar 'Neues türkisches Handels-und Transportrecht' in *Transportrecht,* 36(5), 178-191, 189, ftn. 138.

[134] Turkish Commercial Code (Code No 6102, date: 13 January 2011), *Official Gazette* no: 27846 dated 14 February 2011, art. 1350. Hereinafter referred to Turkish Commercial Code, art. 1350 (1).

[135] Art. 1350 (1) of the new Turkish Code reads "1) The provisional attachment or seizure of a ship, the sale through foreclosure of a ship and the consequences of such sale including transfer of ownership as well as all actions and acts of disposal related to the foreclosure shall be governed by the laws of the country in which the ship is located during the realisation of such actions and acts of disposal. Nevertheless, in the event of sale of a Turkish flagged ship through foreclosure abroad, it is mandatory for the institutions or relevant persons realising the auction to notify: a) the Turkish Ship Registry where the ship is registered, b) the owner of the ship registered at the registry, and c) the holders of other rights and receivables registered at the ship registry of such auction; or to announce the same with a newspaper with more than fifty thousand nationwide in Turkey sold copies, the costs of which shall be borne by the relevant persons, at least thirty days prior to such sale. In the event of sale of a ship through foreclosure abroad without the above notification and announcement, its records may not be deleted and the rights and receivables over the ship registered with the Turkish Ship Registry will be reserved."

the sale in a newspaper with a circulation over 50,000 which is distributed all over Turkey or a mandatory notification of the judicial sale to the Turkish Ship Registry, the owner of the ship registered at the registry and the holders of other rights and receivables registered at the registry. If the compulsory requirements are not met, the Turkish court and administration will not recognise the foreign judicial sale and will consequently refuse to deregister the ship from its registry or reregister it under the new owner.[136]

Although no state is of course compelled, absent a multilateral instrument, to accept the foreign judicial sale decision, non-recognition has a negative bearing on all parties involved in a judicial sale.[137]

2. Recognition of In Rem Rights

In case the foreign *res judicata* does not include the assignment of property, the conflict-of-law method comes into play. In all three discussed jurisdictions, the law applicable to the acquisition or loss of rights *in rem* on ships is governed by the *lex situs*. This could however be either the law of the physical *situs* of the ship *i.e. lex executionis* at the time it was sold as is the case in England,[138] or the law of the artificial *situs* of the ship, i.e. the *lex registrationis,* as is the case in Belgium[139] and the Netherlands.[140] When the latter *lex registrationis* is applied by the respective states and when this law does not recognise the judicial sale for whatever reason, the judicial sale cannot have effect in the recognising state.

3. Shortcomings and Solution

Failing an international, bilateral or multilateral instrument,[141] courts rely on their national rules to decide on the recognition of a foreign judicial sale. Some states do

[136] Turkish Commercial Code, art. 1350 (1), last paragraph.

[137] See Chapter 7.

[138] Dornoch Ltd. and others v. Westminster International BV and Others [2009] *EWHC* 889, question 9. In this case it was determined that the law of the actual *situs* of the ship, rather than law of the artificial *situs* (law of the place of registry), is the relevant law governing the transfer of rights created abroad.

[139] BCIPL, art. 87 § 1 para 2.

[140] DCC, book 10, art. 127 para 1.

[141] With their limited scope and a small number of state parties, the International Convention on Mortgages and Liens of 1993 and the 1999 Arrest Convention do not in their current form make for successful instruments in obtaining global recognition of judicial sales. See Chapter 2 for more details.

not have a legal framework for recognising decisions at all, while other jurisdictions have a framework but very broadly interpret certain grounds for refusing recognition. Although the foreign judicial sale decision usually dictates that the ship is sold 'free and clear of all encumbrances', the auctioning court—as a matter of sovereignty—cannot force another state nor its administration to recognise and give effect to its decision.[142] The decision ordering the free and unencumbered sale does not as such have universal effect, which forms the key source of uncertainty. This uncertainty might have implications for all those connected to the judicial sale, such as the ship's financing bank, other claimants and the purchaser.

In the first place, non-recognition could have negative implications on the new owner of the ship. He should be aware that he may face issues with having the ship registered under his ownership after the auction.[143] Furthermore the new owner can be exposed to claims from the original owner or a pre-sale claimant causing an interruption in his free enjoyment of the ship and resulting in considerable litigation costs. All these possible threats to his free enjoyment of the ship might result in purchasers being generally discouraged from bidding so that, potentially, a lower auction price is achieved. This adverse impact on the sale proceeds resulting from cases of non-recognition is in the second place also unfavourable to all actors in the maritime industry including the debtor in case of a residual interest.

The negative implications of the uncertainty around the recognition of a foreign judicial sale engender questions as to the objective and usefulness of the judicial sale as a method of enforcement. As a judicial sale is still the ultimate and most commonly used process to enforce a claim against the ship, a solution alleviating the insecure position of all parties involved in a judicial sale should be found. Some think that it might be more effective and assure a broader acceptance if an international instrument dealing only with the recognition of judicial sales of ships and its effects were drafted.[144] The idea of formulating a new instrument specially for the purpose of obtaining international recognition of judicial sales of ships originated within the framework of the Comité Maritime International.

[142] M.N. Shaw, *International law* [Cambridge, 2008] 697-700.

[143] See supra in each national report on the recognition of judicial sales by ship registries. The fact that registries, such as the Belgian and English one, do require a deletion certificate from the previous ship-registry before the auctioned ship can be newly registered might cause some problems as to the integrity of the judicial sale as such: If the *lex registrationis* does not recognise the foreign judicial sale for some reason, thus not implementing the clearing effects the *lex executionis* has proclaimed, the registry before which new registration is demanded will refuse registration, notwithstanding the fact the ship was sold 'free and clear of all encumbrances' according to the *lex executionis*. Although ship registries are however in the end subject to judicial review, it might costs additional time and money to give full effect to the foreign judicial sale decision.

[144] M. Sharpe, towards an international instrument for recognition of judicial sales of ships – political aspects, p 1-7. Available at www.comitemaritime.org - > uploads - > judicial sales - > paper of William Sharpe. (last visited 02/07/2014).

Specifically, lawyers raised the various difficulties they encountered in their practice and decided to draft an international instrument specifically addressing the international recognition of judicial sales of ships. The scope, *modus operandi* and effectiveness of the instrument are discussed in Chapter 7 of this research. Also, the research will discuss other solutions to the problem of non-recognition.

Chapter 7
International Legal Framework for Recognition of Foreign Judicial Sales of Ships

A. The Need for an International Instrument

When a ship is sold by means of a judicial sale procedure, all claims are transferred so as to only lie against the proceeds of the sale, after which the purchaser obtains a 'clean' title, free of all encumbrances whatsoever. The unencumbered title which is obtained following the judicial sale will very likely lead to a higher sale price, to the benefit of claimants insofar as they have a favourable position according to the law applicable to the ranking and payout of claims. This fact means that a judicial sale is often a more beneficial method to enforce claims than, for example, a private sale where maritime liens and other claims survive the transfer of ownership.

The international nature of most judicial sales could however complicate the procedure significantly and the lack of proper laws to deal with this highly international matter could even affect its credibility as a valuable remedy to enforce claims. As evidenced from the national reports, the rules governing the various phases of the procedure differ from state to state. It is not only the conditions that have to be fulfilled before a judicial sale can be started that vary; states also have a very different approach as to which law applies to the determination of priorities in the payout phase. The main points of difference, as highlighted by the comparative summary, might result in the fact that states do have some reservations as to recognising foreign judicial sales.[1] Moreover, the differences between states—for example with regard to the ranking in priority claims—could increase the chance that a certain creditor chooses not to acknowledge a priority hearing in a certain state and rather attempts to start proceedings elsewhere, where the priority system better serves his interests.

[1] See examples of cases regarding recognition problems in the following subchapter.

L. Bleyen, *Judicial Sales of Ships*, Hamburg Studies on Maritime Affairs 36,
DOI 10.1007/978-3-319-24376-4_7

In the case between Goldfish Shipping SA (hereinafter 'Goldfish') and HSH Nordbank AG (hereinafter 'the bank'),[2] the complications that result from non-recognition of a foreign judicial sale are well-illustrated. The underlying facts of the case are as follows[3]: the bank as the mortgagee initiated judicial sale proceedings before the US District Court for the Eastern District of Pennsylvania against Odin, the owner of the Turkish ship called M/V Ahmetbey, in reaction to a default on the part of the owner. The court found in favour of the bank and consequently ordered the judicial sale. Goldfish made the highest bid and was appointed as the purchaser of the ship and obtained the ship "free and clear of all lies, claims, and encumbrances".[4] However, after the US District Court's disposition in the judicial sale proceedings, the ship remained registered in Turkey, with Odin still registered as owner. The reason for the registry's refusal to implement the effects of the foreign sale was that according to Turkish law, a judicial sale of a Turkish ship abroad is deemed to be in violation of public policy and is therefore in general not recognised.[5] The pre-sale owner also informed Goldfish and the bank about the fact that the sale in Philadelphia was illegal under Turkish law and that he would thus continue to fight for ownership of the ship. When the ship was calling at port of Barcelona, Odin arrested the ship and contested the proceedings that took place in Philadelphia. He stated he was the rightful owner of the ship since the ship and his ownership over the asset were still registered in Turkey. The court of Barcelona opened litigation on the matter. In order to continue trading, Goldfish posted security to have the ship released. The arrest nevertheless resulted in a significant period of off-hire, certainly considering the strong charter market at that time. After 2 months, the ship was arrested again in Ravenna by the previous owner, on the basis that the previous security was insufficient. Again, the bank deposited security for the claim in order to release the ship. The claim of the pre-sale owner was, however, later dismissed in the court of Ravenna, but Goldfish again incurred a considerable amount of damage. Taking into account these underlying facts, Goldfish turned its attention to the bank before the court in Pennsylvania, asserting that the bank breached its obligations because the sale was, contrary to that what was stated in the sale conditions, not free of all claims. Goldfish claimed that HSH Nordbank did not take sufficient action to ensure a clean title over the ship. Moreover, since the bank had not given its consent to also delete its own mortgage from the Turkish registry—there was an open claim against the old owner—Goldfish asserted that the bank had breached its duties and indirectly interfered with Goldfish's ownership. The court in Philadelphia found, however, that the Bank was not at fault and that it was Odin who illegally interfered in

[2] Goldfish shipping, S.A. v. HSH Nordbank AG, Nos. 09-2314 and 09-2399, 21 April 2012, *United States Courts Opinions*, JU 4.15.

[3] Ibid., p 2–4.

[4] Goldfish shipping, S.A. v. HSH Nordbank AG, Nos. 09-2314 and 09-2399, 21 April 2012, *United States Courts Opinions*, JU 4.15.

[5] Ibid., p 2.

Goldfish's ownership over the vessel.[6] The court added to its ruling that the mere fact that a ship is not deleted from its registry does not affect the actual legal status of the ship as created by the American judicial sale. At the time when the Goldfish claim proceeded against the bank, the original owner started various lawsuits against the bank in Turkey, seeking recovery of the ship that was allegedly unlawfully auctioned on the initiative of the bank. The numerous problems for both the purchaser and the bank in this case were a direct result of the non-recognition of the Pennsylvanian judicial sale in Turkey.

This case, however, is not a one-time occurrence but rather gives vivid notice of the significant problems that can indeed arise when states do not recognise foreign judicial sales.[7] The same problems in fact arose in a South African case between Bridge Oil Limited and the Fund Constituting the Proceeds of the Sale of the MV "Mega S",[8] where non-recognition of a foreign judicial sale by the Turkish registry was again an issue. The dispute concerned a claim of "Bridge Oil Limited" for supply of bunkers sold and delivered to the Aksu, a ship registered in the Turkish registry. The Turkish Civil Court of First Instance granted the claimant a so-called "pledge right" and consequently registered this right in the Turkish ship registry.[9] Under Turkish law, this right takes priority over the mortgage. Due to a default on behalf of the owner of the ship, the mortgagee of the ship, the "Hamburgische Landesbank-Girozentrale", caused the ship to be arrested and judicially sold in Denmark. The ship was sold "free from all claims, liens or encumbrances".[10] After the sale, the ship—named the "Mega S"—was registered in the Maltese registry and started trading again. Due to a default on behalf of the new owner, the ship was again arrested and sold, at the instance of the bank, this time in South Africa. When the court distributed the sale fund, the bunker supplier of the Aksu submitted that its claim was a charge on the ship falling within section 11(4)(d) of the South African Admiralty Jurisdiction Regulation Act 105 of 1993 ('the Act'), which includes "a claim in respect of any mortgage, hypothecation or right of retention of, and *any other charge* on, the ship, effected or valid in accordance with the law of the flag of the ship [emphasis added]". Consequently, the bunker supplier contended that its

[6] Ibid., p 3.

[7] For more cases where recognition of a foreign judicial sale had been an issue both in Turkey and elsewhere see L. Henry, "brief discussion on judicial sale of ships", International Sub Committee on the judicial sale of ships, Comité Maritime International, available at www.comitemaritime.org -> work in progress. (last accessed 9.02.2012). Moreover throughout the research cases have been mentioned where judicial sales were not recognised abroad or were challenged: see for example Rechtbank Amsterdam, 7 May 2004, *KG* 04/912 *S&S* 2007, 108, 528; The Acrux [1962] 1 *Lloyd's Rep*. 405; The Cerro Colorado [1993] 1 *Lloyd's Rep*. 58, 61.

[8] Bridge Oil Limited v Fund Constituting the Proceeds of the Sale of the MV "Mega S" (formerly the MV "Aksu") and Others (AC 58/2002) [2003] *ZAWCHC* 24 (12 June 2003).

[9] The holder of the so-called pledge right avoided labelling his claim as a maritime lien (even though the nomenclature was used in the Turkish Ship Registry).

[10] Bridge Oil Limited v Fund Constituting the Proceeds of the Sale of the MV "Mega S" (formerly the MV "Aksu") and Others (AC 58/2002) [2003] *ZAWCHC* 24 (12 June 2003).

ranking as against the mortgage had to be determined in accordance with the law of the flag of the ship, in line with section 11(5)(d) of the Act, stating that the claims as mentioned in section 11(4)(d) should "amongst themselves, rank according to the law of the flag of the ship.[11] The fact that the ship was not deleted from the Turkish registry after the completion of the first judicial sale in Denmark, prompted the bunker supplier to recover his "pledge right" against the fund of the second judicial sale. The bunker supplier stated that his claim continued to determine the law that was to be applied to determine the ranking of his claim. The court held that section 11(4)(d) of the Act was merely a ranking clause dealing solely with the consequences and not with the nature of the claim.[12] The nature of the claim as such had to be determined on the basis of the *lex fori*. Since according to South African case law a bunker supplier does not hold a maritime lien,[13] the Court did not find the claim to have the status of a lien.[14] Moreover, the court stated that the law of the flag was in no case the Turkish flag because of the fact that the ship was sold by judicial sale in Denmark, transferring an unencumbered title to the purchaser.[15] The court hereby referred to the statement of Hewson J in The Acrux to highlight the importance of world-wide recognition of foreign judicial sales:

> [. . .] Were such a clean title as given by this court to be challenged or disturbed, the innocent purchaser would be gravely prejudiced. Not only that, but as a general proposition the maritime interest of the world would suffer. Were it to become established, contrary to general maritime law, that a proper sale of a ship by a competent Court did not give a clean title, those whose business it is to make advances of money in their various ways to enable ships to pursue their lawful occasions would be prejudiced in all cases where it became necessary to sell the ship under proper process of any competent Court. It would be prejudiced for this reason, that no innocent purchaser would be prepared to pay the full

[11] Section 11(5) of the Act states that "The claims mentioned in paragraphs (b) to (f) of subsection (4) shall rank after any claim referred to in paragraph (a) of that subsection, and in accordance with the following rules, namely — [. . .] (d) claims mentioned in paragraph (d) of subsection (4) shall, among themselves, rank according to the law of the flag of the ship;"
Section 11(4) lists the claims contemplated against a fund which has been established by the sale of a vessel and 11(4)(d) reads: "a claim in respect of any mortgage, hypothecation or right of retention of, and any other charge on, the ship, effected or valid in accordance with the law of the flag of the ship, and in respect of any lien to which any person mentioned in paragraph (o) of the definition of 'maritime claim' is entitled;"

[12] Bridge Oil Limited v Fund Constituting the Proceeds of the Sale of the MV "Mega S" (formerly the MV "Aksu") and Others (AC 58/2002) [2003] ZAWCHC 24 (12 June 2003), para 9 referring to Oriental Commercial and Shipping Co Ltd v MV Fidias 1986 (1) SA 714 (D) at 718B.

[13] Bridge Oil Limited v Fund Constituting the Proceeds of the Sale of the MV "Mega S" (formerly the MV "Aksu") and Others (AC 58/2002) [2003] ZAWCHC 24 (12 June 2003), para 10, referring to the precedent of Transol Bunker BV v MV Andrico Unity and Others 1989 (4) SA 325 (A), stating that maritime liens recognised under South African law do not include the claim of a bunker supplier.

[14] The court even found that the so-called "pledge right" was not validly established under Turkish law. See Bridge Oil Limited v Fund Constituting the Proceeds of the Sale of the MV "Mega S" (formerly the MV "Aksu") and Others (AC 58/2002) [2003] *ZAWCHC* 24 (12 June 2003), para 13.

[15] Bridge Oil Limited v Fund Constituting the Proceeds of the Sale of the MV "Mega S" (formerly the MV "Aksu") and Others (AC 58/2002) [2003] *ZAWCHC* 24 (12 June 2003), para 16 (1).

> market price for the ship, and the resultant fund, if the ship were sold, would be minimised and not represent her true value.[16]

Thus, even in the hypothetical case that the bunker supplier was able to claim against the sale fund in the court, the law of the flag that had to be taken into consideration to determine the consequences of the claim would in any case be the law of Malta and not the law of Turkey.

The same problems as regards the non-recognition of foreign sales can be found in other cases where the ship is registered in countries apart from Turkey. For example, in an older case before the court in British Columbia,[17] the Greek government refused to issue a deletion certificate although the ship had been subjected to a judicial sale in Canada after which the purchaser obtained a clean title. The relevant Greek ministry made the deletion of the ship conditional upon the satisfaction of the claims raised against the pre-sale owner by the Greek Seamen's Union.[18] The Canadian court found that the purchaser obtained the ship free and clear of all encumbrances according to the laws of Canada and that no other state should contest that. Notwithstanding its desire that its order and judgments be recognised around the world, it indicated in its decision that it could not exercise control over states that ignored the effects of a Canadian judicial sale.[19]

Going back to the national reports, it seems that the recognition of foreign judicial sales is very likely to be obtained in these three states. However, the absence of any successful international instrument and the large discretion of the judge in the matter results in quite some uncertainty around the worldwide recognition of a judicial sale, leaving room for parties such as dissatisfied previous owners or claimants to exercise their rights as if these have not been extinguished.[20] Non-recognition will compromise the legal protection of the new owner of the ship, which can have a negative impact on future sale proceeds and on the integrity of the judicial sale procedure as a whole. On top of that, there is another barrier to recognition on the administrative level. From the national reports it appears that, even though the judicial sale of a foreign ship has been conducted in a court in state A, the registries of this very state will usually require that the *lex registrationis* recognise the sale and consequently issue a deletion certificate before it can actually implement the effects of its own decision, thus giving the purchaser the right to reregister the ship in his name. Also, when a judicial sale of a domestic registered ship has occurred abroad, it seems that ship registries do not automatically implement the effects and most of the time require that the owner or inscribed claimants agree before deletion of the ship and encumbrances can be completed. Their

[16] The Acrux [1962] 1 *Lloyd's Rep*. 405.

[17] Krochenski v. The ship Galaxias - Fed.Ct. (Trial Div.) (Rouleau J.) - 8 April 1988 summary available on *LMLN* 14 January 1989.

[18] Ibid.

[19] Ibid.

[20] This is exemplified by some cases discussed in each national report.

agreement is not always obtained, however, certainly not in the case they are dissatisfied with how their interests have been served.

In order to avoid the uncertainty around the topic of judicial sales and their recognition, the Comité Maritime Internationale[21] started in 2007 discussions on the necessity and feasibility of an international instrument harmonising the judicial sale procedure and its effects. Such an international instrument could then oblige state parties to recognise each other's' judicial sales and establish the need for certainty around this enforcement method. The harmonisation of some aspects of the procedure and its effects worldwide had already been addressed in earlier discussions that took place in the framework of the 1967 and 1993 Conventions.[22] Unfortunately, neither of those instruments has been successful mainly because of the fact that the legal regime of proprietary security rights as addressed by the Conventions is considered to be a highly contentious one. Moreover both Conventions are limited in scope[23] and only cover rules related to notice and effects of the judicial sale. The main idea of the CMI is to take the topic out of the contentious framework of the Conventions and create a new instrument that only addresses the judicial sale of ships. The instrument should in addition resolve the difficulties maritime actors have encountered over the years with regard to the recognition of foreign judicial sale procedures. For this reason, the CMI decided in 2008 to include the topic of judicial sales of ships in the substantive program of the CMI Athens Conference.[24] Since this conference, the topic of judicial sales of ships has been subject to extensive discussions which in the early summer of 2014 resulted in the approval of a text called the "Draft International Convention on Foreign Judicial Sales of Ships and their Recognition" (hereinafter referred to as the 'Final Draft' or the 'Draft').

In what follows, this part will take a closer look at the preparatory work of the revised Beijing Draft, after which there will be a discussion of the *modus operandi*

[21] The CMI is a non-profit international organisation established in Antwerp in 1897 which concerns itself with the "unification of maritime law in all its aspects" (CMI Constitution 1992, Art 1). Available at www.comitemaritime.org -> about us -> constitution. (last accessed on 25/08/2014.) The CMI works on the basis of member-associations which discuss the proposed topics with all relevant maritime actors, after which the representing lawyers of that particular association form a common position. Consultations on the international level are conducted regularly to exchange the ideas formed in each member-association. Additionally, the medium of electronic mailing provides an efficient forum for discussing and gathering valuable information among the member-associations. The CMI is one of the very first NGOs receiving consultative status at the International Maritime Organisation (hereinafter "IMO"). Having been bestowed this status, the CMI is in close cooperation with the IMO with regard to maritime law issues.

[22] See Chapter 2 for an overview of both Conventions.

[23] Both Conventions cover only the enforcement of maritime liens and mortgages, thus leaving out claims from a bunker supplier or a cargo owner.

[24] The CMI secretariat organises conferences every three to four years. Besides this, the CMI Assembly is usually held in conjunction with meetings organised by the member associations. For more information see www.comitemaritime.org -> about us -> constitution Part II. (last accessed on 25/08/2014).

and an assessment of the Draft's material aspects. To conclude, future perspectives as to the Beijing Draft and the credibility of the judicial sale procedure in general are discussed.

B. The Preparation of the Draft Convention on Judicial Sales of Ships

I. Preliminary Discussions and Questionnaire

During the CMI executive council meeting held in Dubrovnik in 2007, the topic of judicial sale was briefly discussed, after which the council decided to conduct a preliminary study on the topic. Moreover it was agreed to include the subject matter in the substantive program of the Athens Conference taking place the year after. During this Conference, the topic and issues were presented,[25] after which the executive council appointed experts in the field to set up an international working group (IWG) on judicial sales of ships. This working group conducted research on various laws (including case law) on the subject matter so as to identify the issues to be covered by a questionnaire. The goal of the questionnaire was to give a better overview over the existing problems in relation to judicial sales of ships and to enable the CMI to assess whether it was an opportune time for an international instrument.

A first draft questionnaire was formulated and submitted to the executive council in 2010, after which comments on the draft were requested to the national maritime law associations. Giorgio Berlingieri edited the set of questions that led to the final text of the questionnaire which consists of 30 questions.[26] The first category of questions deals with the concept of judicial sale of ships. This part aims mainly at comparing national laws as to the notion of the procedure and the circumstances in which the sale must be effected. Moreover, it enables the working group to determine whether there are overlaps that can help in defining the concept in an international instrument. Questions with regard to procedural elements and the effects of the judicial sale procedure are set down in, respectively, the second and third category of questions. The fourth set of questions deals with the problematic issue of the recognition of foreign judicial sales of ships and state practice on this topic. The question about the appropriateness and the necessity of developing a new international instrument that unifies rules concerning judicial sales of ships in general and the foreign recognition thereof in particular is put forward in the last

[25] The topic was briefly presented on the basis of a preliminary study conducted by H. Hai L., A Brief discussion on judicial sales of ships. Available at www.comitemaritime.org -> work in progress -> judicial sales. (last accessed 25/08/2014).

[26] The questionnaire is available at www.comitemaritime.org -> work in progress -> judicial sales. (last accessed 25/08/2014).

part of the questionnaire. Approximately 20 maritime law associations from around the world replied to the questionnaire, which enabled the working group to analyse the answers comparatively and, on the basis of these responses, prepare a First Draft Instrument.

When drafting the First Instrument, the IWG relied on the material conclusions one could draw from the answers to the questionnaire. The first set of answers to the questions indicated that the domestic laws of the respondent law associations have the same conception of a judicial ship sale procedure.[27] Most jurisdictions have, either in their procedural or maritime code, a set of rules regulating the judicial sale procedure; however, no definition of the procedure as such was found in their legislation. In most respondent states the judicial sale was realised through a court or under the supervision of a court for the purpose of enforcing a judgment or award or to enforce a title. While on the one hand it seems that the jurisdictions have the same conception of the procedure which might facilitate the drafting process substantially, states seem on the other hand to have very different rules of procedure and have a different balance as between the protection of interests and the efficiency of procedures.[28] The answers to the third set of questions reveal that a judicial sale confers a clean title in all jurisdictions. This nonetheless does not mean that the previous registration is automatically annulled when the judicial sale was effected, nor does it mean that all states register ships on the basis of a bill of sale or a similar document.[29] When it comes to the recognition of foreign judicial sales, the answer to the fourth set of questions proves that, among each other, states vary significantly in the rules and conditions they apply on the recognition of foreign judicial sales.[30] On the one hand this might suggest that there is a need to have an international instrument that harmonises the laws on the matter. However, the different approaches might on the other hand considerably complicate the harmonisation of some parts of the procedure. In the answers to the fifth category of questions some concern was expressed as to the overlap with other conventions[31]; however, there was more or less consensus between the respondent maritime law associations that these instruments did not have a potential to be successful and to solve the current problems incurred with the judicial sale procedure. Having carefully analysed the answers to the questionnaire, the drafting committee stood before a difficult exercise of making a Draft that respects the different and often well-established procedural approaches of states by harmonising only those parts of the judicial ship sale procedure that are necessary to obtain the goal of worldwide

[27] See answers to first set of Questions, available at www.comitemaritime.org -> work in progress -> judicial sales. (last accessed 25/08/2014).

[28] See answers to second set of Questions, available at www.comitemaritime.org -> work in progress -> judicial sales. (last accessed 25/08/2014).

[29] Ibid.

[30] Ibid.

[31] Ibid.

recognition of judicial sales and their effects. The first draft produced by the IWG was a careful initial solution to this complex exercise.

II. First Draft Instrument

The "First Draft Instrument on the Recognition of Foreign Judicial Sales of Ships" had been circulated a few months before the meeting of the CMI Assembly in September 2011 taking place in Oslo.[32] At this meeting an international subcommittee (ISC) on judicial sales of ships was convened, consisting of members elected by their respective member associations. The subcommittee reviewed and discussed the First Draft, after which they requested the IWG to revise and improve the First Draft taking into consideration the comments made at the ISC meeting in Oslo.

The First Draft contains nine articles. As in most international conventions, this draft starts off by defining some material concepts (art. 1) and delimiting the scope of application (art. 2). The draft provides, moreover, some minimal requirements that have to be satisfied in each judicial sale procedure. More in particular, the Draft stipulates detailed notice requirements that should be met prior to the start of a judicial sale process (art. 3). The Draft continues with determining the (clearing) effects a judicial sale shall have (art. 4) and, moreover, introduces the issuance of a certificate of judicial sale (art 5) in order to facilitate deregistration and registration of the ship after she was judicially sold (art 6). Specifically, the Draft addresses the issue of recognition (art. 7) and the circumstances in which recognition may be refused (art. 8). The recognition of foreign judicial sales is, furthermore, extended to sales which were not accomplished in the territory of a state party, unless states make a reservation in this regard (art. 9). The nine articles contained in the First Draft Instrument form the general framework on the basis of which further amendments have been made.

III. Second Draft Instrument

The Second Draft Instrument together with its commentary was circulated in July 2012. The national maritime law associations were requested to produce their comments on this draft, which were analysed by the IWG in order to make sufficient preparations for the CMI Conference in October 2012 taking place in Beijing.

The Second Draft Instrument does not as such fundamentally change the provisions contained in the First Draft. Some linguistic refinements were made

[32] Ibid.

however to the definition section, and the scope of the instrument was simplified to avoid any misinterpretation. Besides this, the grounds for refusing recognition were reviewed and some minor changes were made to safeguard that recognition can be refused only in highly exceptional circumstances.

IV. Beijing Draft Instrument

At the Beijing Conference taking place on October 2012, the Second Draft was discussed and amended. Additionally, it was also decided at the Conference to include a preamble in which some guiding principles are laid down in order to facilitate a uniform understanding of the instrument.[33] Again, some amendments were made to the definition section in order to avoid any inconsistencies or ambiguity. Additionally, the Beijing Draft implemented some definitions in order to improve the chance that states would develop a common conception of the Draft. The scope of application was moreover slightly changed by making the Instrument applicable between state parties as a general rule and by deleting the provisions on the option to restrict recognition to state parties (art. 9). The Beijing Draft instrument also implemented a new art. 9 and amended provisions in art. 3 in order to avoid conflicts with other international conventions. Next to the option of refusing recognition, the Beijing Draft also creates the possibility of suspending recognition by a court in the event proceedings have been started in another competent court to contest the validity of the judicial sale.

At the end of the Conference a "Proposed Draft International Convention on Recognition of Foreign Judicial Sales of Ships" (known as the Beijing Draft) was presented to the ISC for adoption. However, a significant segment of the national maritime law associations wished for another opportunity to comment on the Draft and suggested that a commentary to the Draft should be created. Moreover, most delegates were not authorised by their proper law associations to vote for the adoption of a new instrument. Half a year later, in March 2013, the Beijing Draft and its commentary were distributed among the National Maritime Law Associations (NMLA's) and their remarks were invited. The IWG assembled again in Dublin at the end of September 2013 and discussed all the comments received on the Beijing Draft. After this meeting it was decided that a final wording of the Draft would have to be prepared, supplemented by a commentary.

[33] See commentary on the Beijing Draft on www.comitemaritime.org -> work in progress -> judicial sales. (last accessed 25/08/2014).

V. Final Draft

After the symposium in Dublin, the IWG started revising the Beijing Draft and its commentary, after which comments of various legal experts in the field were again invited. The instrument was discussed once more at the CMI conference in Hamburg in June 2014, after which some textual changes were again made. Also the scope of the instrument was once again amended. At the end of the Conference the revised Draft was submitted for adoption. The CMI Assembly adopted a resolution that approved the text of the "Draft International Convention on Foreign Judicial Sales of Ships and their Recognition" (Final Draft).[34] Since the CMI is not an intergovernmental organisation and it thus does not have the capacity to adopt international conventions, the CMI executive council will have to submit the Final Draft to an intergovernmental organisation[35] or will have to convince a state to take the initiative to assemble a diplomatic conference.[36] Since the Draft is moreover also regulating matters that fall within the exclusive legislative competence of the EU, the implementation might also be problematic for those jurisdiction that are subject to EU law.[37]

In what follows, the material aspects of the Final Draft will be discussed; subsequently it will be assessed in the light of how the instrument resolves the aforementioned problems related to (recognition of) the judicial sale procedure and which alternative routes are available.

C. The Material Aspects of the Final Draft

I. The Rationale Behind the Final Draft

The fundaments on which the Final Draft is built can be found in its preamble. There, state parties express that the objective of the Final Draft is to protect *bona fide* purchasers by facilitating the recognition of the judicial sale and providing only limited possibilities to challenge their clean title to the ship. In turn for the protection of the purchaser, the Final Draft also safeguards the interests of other parties involved in the sale by implementing some conditions that should be met

[34] See Annex of this book or see www.comitemaritime.org -> work in progress -> judicial sales for the full version of the Beijing Draft.

[35] Some institutions which would have the competence to accept the current Draft Instrument are the International Maritime Organisation (IMO), the United Nations Commission on International Trade law (UNCITRAL), the United Nations Conference on Trade and Development (UNCTAD) and the International Institute for the Unification of Private Law (UNIDROIT).

[36] The resolution is available on www.comitemaritime.org -> work in progress -> judicial sales. (last accessed 25/08/2014).

[37] See infra D. Assessment of the Final Draft.

before the mechanism of recognition provided for in the Final Draft becomes operative.

II. The Scope of the Final Draft

The scope of the Final Draft is set out in art. 2 and reads as follows (with emphasis added): "the convention shall apply to the *conditions* in which a *judicial sale* taking place in one *state* shall be *sufficient for recognition* in another state." This provision delimits the scope of application in several ways. In the first place the Instrument applies to determine the conditions that have to be met before a judicial sale is considered to be "sufficient" for recognition. In other words the Convention applies to determine the conditions that have to be met before recognition will be given to a foreign judicial sale.[38]

The Final Draft Instrument, in the second place, only covers judicial sales that give a clean title to the purchaser.[39] This is implied by the definition of a judicial sale in art. 1.8, stating that a judicial sale within the meaning of the Instrument means "any sale by a competent authority [. . .] by which clean title to the ship is acquired by the purchaser [. . .]". Private sales are thereby excluded, although court-approved private sales are again explicitly included in the area of application.[40] Mainly triggered by the differences between civil and common law states, the drafting committee had extensive discussions on this matter.[41] The common law states preferred including the existence of an action *in rem* as a prerequisite for the application of the Draft. However, since civil law states do not know this concept, the clean title was chosen as the common characteristic that could set the desired scope.

In the third place, the Instrument is not only applicable to the recognition of judicial sales taking place in the territory of a contracting state, but also to other judicial sales which were effected by a non-member state. To narrow down the scope of application, state parties have, however, the explicit possibility to make a reservation (on the basis of art. 9) so as to apply the instrument only to the recognition of judicial sales conducted in the territory of state parties.

[38] The actual content of this convention is not restricted to the conditions for recognition. See infra on assessment of the Final Draft.

[39] Draft International Convention on Foreign Judicial Sales of Ships and their Recognition (known as the Beijing Draft), amended in Hamburg 2014, art. 2.

[40] CMI Draft Convention of judicial sale of ships, art. 1.8.

[41] IWG Judicial Sales of Ships taking place in Oslo, 27 September 2011.

III. The Modus Operandi *of the Final Draft*

The Final Draft introduces new features that enable its state parties to facilitate the process of recognition of foreign judicial sales and to realise the main rationale of the instrument: protecting *bona fide* purchasers while at the same time implementing mechanisms that also safeguard rights of others involved in the judicial sale. As an important step towards recognition, the Final Draft therefore implements various procedural steps that should be followed before a judicial sale taking place in one state shall be sufficient for recognition in another state. In what follows these procedural steps will be elaborated in greater detail.

1. Notice to Creditors

The first procedural step that the court where the sale takes place should take is presented in Art. 3, this prescribing the obligation to give notice of the sale to the ship owner, to holders of a mortgage, hypothèque or maritime lien, and to the ship-registration authority of the state where the ship is registered, at least 30 days prior to the judicial sale day.[42] When the ship is also registered in the bareboat charter registry, art. 3(2) of the Final Draft extends the notice requirement to this registry. Art. 3(3) and (4) gives more information on what must be included in the notice mentioned in Art. 3(1) and (2) and what further formalities have to be fulfilled before the notice is considered to be validly given.[43]

Art. 3 of the Convention is almost identical to the provisions of the 1993 Mortgage and Liens Convention dealing with the same matter. However, one small but significant difference between the two instruments can be found: while art. 11.3 of the 1993 Convention requires that those to whom the notice is addressed should provide confirmation of receipt, the Final Draft does not enact this requirement in order to avoid the risk that a lack of receipt will invalidate the judicial sale. Even though the Final Draft states in its article 3.5 that nothing shall prevent a state party to the (future) Judicial Sale Convention from complying with other international conventions by which the state is bound, the requirement of the confirmation of receipt could very much undermine the goal of the Final Draft. Therefore, contracting states to both the (future) Judicial Sale Convention and the 1993 Convention would do good to denounce the latter Convention in order to not be in breach of it and to sufficiently protect the interests of the purchaser at the auction.

[42] CMI Draft Convention of judicial sale of ships, art 3.1 (a)-(d).

[43] From the context it is clear that the formalities and requirements with regard to the content of the notice are minimum standards which can always be expanded by the state conducting the sale.

2. Recognition of Sale

In line with the rationale of the Final Draft, the leading issue that is regulated by the Draft is the recognition of the foreign judicial sale. As a general rule, the court of a state party shall recognise the effects of a judicial sale conducted in any other state.[44] Recognition, according to the Final Draft, means that the effect of the judicial sale of a ship "shall be accepted by a state party to be the same as it is in the state of judicial sale".[45] This means that under the Final Draft the judicial sale and its effects are extended to the recognising states, irrespective of whether the state of recognition assigns the same effects to a judicial sale decision or not. Even though states among each other mostly adopt the same position when it comes to the effects they assign to a domestic judicial sale,[46] any possible difference between (member) states has been levelled out by the scope of the Final Draft, its dealing only with judicial sales giving a clean and unencumbered title (art. 2) and its art. 4 explicitly dealing with the effects that each judicial sale shall have, i.e. the clean title and the extinguishment of all rights and interests in the ship. By specifying what effects a judicial sale has in all contracting states of the Final Draft, these effects will be extended to the recognising state. Recognition also implies that the courts of a state party will have to reject any application with regard to arrest of the ship on the basis of claims dating from before the sale[47] unless there are circumstances when recognition may be suspended or refused (art. 8).

In order to obtain formal recognition of the effects of a judicial sale or to block arrest proceedings on the basis of a pre-sale claim, one key condition must be fulfilled: the purchaser needs to present a certificate of judicial sale to the state of recognition. This certificate, as described in art. 5, will be issued by the state of judicial sale on the request of the purchaser. The certificate has to record that the ship was sold to the purchaser free of all encumbrances, in accordance with the law of the state of judicial sale and the Final Draft.[48] Moreover, the certificate has to be in line with the formalities as set forth in the Final Draft and needs to contain certain minimum particulars such as details on the ship, the state of judicial sale, and details on the purchaser.[49] In the Annex of the Draft a sample of such certificate is attached in order to increase its practicability.[50] Furthermore, the notice has to be given no later than 30 days prior to the judicial sale. If any formal requirement is not fulfilled

[44] CMI Draft Convention of judicial sale of ships, art. 7.1.

[45] Ibid., art. 1.14.

[46] See CMI Questionnaire, 3rd group of questions, questions 1–4. Questionnaire is available on www.comitemaritime.org -> work in progress -> judicial sales. (last accessed 25/08/2014).

[47] CMI Draft Convention of judicial sale of ships, art. 7.2.

[48] Ibid., art. 5.1(a).

[49] Ibid., art. 5.2.

[50] This was the idea of the German MLA, which took the example of the use of a specimen from other European Regulations such as the Brussels I Regulation, where reference is made to specimens – attached to the Regulation's annexes – confirming the enforceability of judgments, court settlements, and authentic instruments. See opinion of GMLA on the Beijing Draft of 23 July

by the court under whose authority the sale is effected, the purchaser may be prevented from obtaining a clean title to the ship[51] and acquiring a certificate.[52]

The purchaser can also use this certificate to deregister the ship from its previous registry and to register the ship in a registry of his choice. In fact, upon submission of a certificate issued in accordance with art. 5, the old ship registry has an obligation to delete all registered charges on the ship and either re-enter the ship in its registry under the name of the purchaser or produce a deregistration certificate.[53] Moreover, if the ship was flying the flag of a state of bareboat charter registration, the ship's original registry shall issue a certificate that withdraws the rights to register in and temporarily fly the flag of another state.[54]

3. Challenging Judicial Sale

The right to challenge a judicial sale is considerably restricted in the Final Draft. Only a so-called interested person, i.e. the owner of the ship immediately prior to the judicial sale,[55] has standing to challenge the judicial sale.[56] Moreover, the Final Draft prescribes that interested persons have the right to challenge the sale only before the court where the judicial sale itself took place.[57]

4. Grounds for Suspension and Refusal of Recognition

The Final Draft provides an exhaustive list of grounds that justify either a refusal or a suspension of recognition. Firstly, the physical absence of the ship that was sold from the jurisdictional area of the court by whose authority the sale took place is a ground for refusing recognition.[58] In the second place, refusal is allowed when the competent court of the state of judicial sale rendered a judgment (which is no longer subject to appeal) that nullifies the judicial sale and its effects.[59] Finally, recognition may be refused if the court in a state party finds that the recognition of the judicial sale would be manifestly contrary to the public policy of that state party.[60]

2013 available on www.comitemaritime.org -> work in progress -> judicial sales. (last accessed 25/08/2014).

[51] CMI Draft Convention of judicial sale of ships, art. 5 (1).

[52] Ibid., art. 4.1 (b).

[53] Ibid., art. 6(1).

[54] Ibid., art. 6.2.

[55] Ibid., art. 1.7.

[56] Ibid., art. 7.4.

[57] Ibid., art. 7.3.

[58] Ibid., art. 8.1.

[59] Ibid., art. 8.2 (b).

[60] Ibid., art. 8.3.

Recognition of the judicial sale may be suspended if legal proceedings challenging the judicial sale are started by the interested person before the judicial sale court[61] and the latter court has suspended the effects of the judicial sale.[62]

D. Assessment of the Final Draft

The current Final Draft is the result of a rather time-consuming[63] drafting process which saw the participation of a set of active legal practitioners representing their respective maritime law associations. The participating drafters, all recognising to some extent the problems that come with the judicial ship sale procedure, formulated a set of rules that have the objective to provide the purchasers of ships at judicial sales more protection in terms of their unencumbered and clean entitlement to the ship.[64] Although this objective of the instrument is very straightforward, the drafting of the provisions proved to be no sinecure. This was mainly due to the fact that a fair balance had to be found between protecting two competing interests that are typically at stake in a judicial ship sale procedure: on the one hand the interests of the purchaser and on the other hand those of persons holding a property or security interest in the ship.

The challenge of creating an international instrument on this issue is already reflected in the drafter's difficulty in defining the scope of application of the instrument. According to art. 2, the provisions of the Final Draft are applicable to the conditions that must be met so that "a judicial sale in one state shall be sufficient for recognition in another state". When looking however to the Final Draft, the actual scope of the instrument is much broader and is certainly not restricted to dealing with the conditions of recognition. The Draft in the first place addresses in its art. 3 the (notice) requirements the court conducting the judicial sale will have to meet before the mechanism of the Final Draft is activated.[65] In a subsequent provision the Draft deals with the effects of a judicial sale on the position of those holding a property or security interest in the ship.[66] The Draft then continues on to implement a tool, i.e. a certificate that aims to facilitate the recognition of the judicial sale by both courts and administrative institutions.[67] The instrument then defines what effects those sales that are found to be in line with these formal

[61] Ibid., art. 7.3.

[62] Ibid., art. 8.2 (a).

[63] In the CMI in particular, the drafting process often takes a long time as the drafting committee usually consists of practising lawyers who do not have the capability to work on the draft on a full-time basis.

[64] CMI Draft Convention of judicial sale of ships, preamble.

[65] Ibid., art. 3.

[66] Ibid., art. 4.

[67] Ibid., art 5.

requirements shall have in other states[68] and on which conditions the sale is not given its desired effect, despite the formal requirements having been met.[69] Due to the fact that the Draft, in addressing all these various issues, has become something of a mishmash rather than a clear set of rules on the judicial sales of ships, it is very hard indeed to define the scope of application as evidenced by art. 2.

The fact that the instrument is in principle applicable to all judicial sales, also those that were conducted in a non-member state, is certainly another questionable aspect brought forward by the provision on the scope of application.[70] Since the instrument spells out a number of strict requirements to which states where the judicial sale takes place should adhere, it is rather likely that non-contracting states unaware of such requirements will not be in compliance with the formalities. When states do not enter a reservation to restrict the application of the instrument to the recognition of judicial sales conducted in state parties (art. 9), the danger might then be that contracting states in applying the instrument will not recognise a judicial sale and its desired effects due to the fact that the formal requirements as set out in the Draft are not met. This can certainly not be consistent with the main objective of the instrument.

The Final Draft's most substantial formal requirement obliges the court where the judicial sale takes place to give notice to all interested parties of the sale at least 30 days prior to the judicial sale.[71] When this requirement is not met, the purchaser might be blocked from acquiring a clean title[72] and a certificate,[73] what can in turn make it more difficult to obtain de-registration of the ship and its charges.[74] Additionally, the 30-day notice requirement might in some occasions considerably slow down the procedure, certainly in the case of a court-approved private sale[75] or a sale *pendente lite*,[76] both of which are procedures that are frequently used with the goal of accelerating the whole enforcement procedure. Slowing down a well-established procedure under the guise of protecting the creditors cannot serve the interest of any party involved in the judicial sale, and it could affect the popularity of the Final Draft in its entirety.

The provision on the notice requirement also implements specific rules on how the notice should be given.[77] The drafters evidently did not take into consideration that there are already successful international and European instruments that deal

[68] Ibid., arts. 6 and 7.
[69] Ibid., art. 8.
[70] Ibid., art. 2.
[71] Ibid., art. 3.3.
[72] Ibid., art. 4.1(b).
[73] Ibid., art. 5.
[74] Ibid., art. 6.
[75] See supra Chapter 6 III (3).
[76] See supra Chapter 5, III.
[77] CMI Draft Convention of judicial sale of ships, art. 3.4.

with how documents should be served abroad[78] and that there is thus no need, in view of the objective of the instrument, to create a new set of rules on this matter. It is moreover essential to note, certainly if the Final Draft is discussed on a higher level, that the EU has exclusive legislative competence on matters such as service of judicial and extrajudicial documents, competency of courts, and recognition of judgments.[79] It is therefore very surprising that the CMI, with headquarters in Belgium—where many European Institutes have their headquarters—is not considering the fact that all the individual European Member States will not have the competency to become a party to conventions that regulate certain areas where the EU already holds its exclusive competence.[80] Since the EU is moreover not a member of IMO or other relevant organisations that might have the competence to deal with the subject matter (UNCITRAL, UNCTAD and UNIDROIT), it might in the end be very difficult to implement the Draft.

The certificate as introduced by art. 5 plays a fundamental role in the instrument. The fact that the certificate is so important for obtaining deletion of an existing registration makes it at the same time also the weakness of the Draft. Common law states, instead of rendering a judgment that decides on the judicial sale, typically issue a bill of sale to evidence the change of ownership. This bill of sale might not entirely conform with the prescribed content of the certificate. Moreover, it is to be questioned whether common law courts, after having used the bill of sale for decades, would be willing to use the certificate as proposed here by the Final Draft.[81] Furthermore, in view of the scope of the Final Draft, the need of the certificate will very much diminish the chance that judicial sales by non-contracting states—unaware of the requirement to issue such certificate—will be recognised by contracting states under the provisions of the current instrument.

Upon production of the certificate, art. 6 of the Final Draft binds the registry where the ship was registered before the judicial sale took place to remove all registered charges on the ship and delete the ship from its books. This, however, does not generally occur on an *ex officio* basis.[82] The purchaser will usually have to apply for such removal and deletion and as such bear the deletion fees and other administrative costs. This can be seen as an encumbrance on the ship. Given the goal behind the instrument, the Drafters should have taken the opportunity to bind the ship registry to delete charges and the ship on an *ex officio* basis upon

[78] See Chapter 2 on the 1965 Service Convention and the 2007 Service Regulation.

[79] ECJ, Opinion 1/03 (Lugano Convention) [2006] *ECR* I-1145.

[80] CMI Yearbook 2010, p. 379. Available at www.comitemaritime.org -> Publications (last visited at 06.05.2014).

[81] See comments of the U.S. Maritime Law Association on the Second Working Draft Instrument on Recognition of Foreign Judicial Sales of Ships and the commentary of the British Maritime Law Association on the revised text of the Convention on the recognition of the foreign judicial sale of ships. Comments available on www.comitemaritime.org -> work in progress -> judicial sales. (last accessed 25/08/2014).

[82] See *supra* national reports.

production of the certifite. The administrative costs could then be deducted from the sale fund, in order to avoid that the deletion costs are borne by the purchaser.

The 8th article of the Final Draft deals with the circumstances in which recognition of a foreign judicial sale can be refused or suspended. One of the exceptions in this provision allows state parties to refuse to recognise a judicial sale when it is found to be manifestly[83] contrary to their public policy.[84] Most treaties dealing with private international law matters typically include such a public policy reservation with the goal of protecting a state's fundamental standards—such as concepts of morality, liberty, and justice—from being violated by foreign laws and decisions.[85] The public policy exception as a ground for excluding foreign law can even be considered as a general principle of law, in the meaning of the Statute of the ICJ, since it exists in all national legal systems.[86] Even though the public policy reservation should be used with caution and should only be invoked as an *ultimum remedium* to protect fundamental principles, it is nevertheless a matter of domestic law to determine which principles are protected by the public policy exception. While some states are very judicious in applying the exception, other states apply it too frequently. A broad interpretation of the public policy exception might undermine the whole rationale of the Final Draft and puts everything back to square one. The Final Draft, in an attempt to narrow down the public policy concept, specified in its art. 8.3 that the reservation can be used only when recognition of a foreign judicial sale would be 'manifestly' incompatible with the public policy of the recognising state. Whether the word 'manifestly' will indeed have its desired effect on states that frequently resort to the public policy exception is very uncertain. No international instrument can in fact compete with a sovereign state's interpretation of the public policy concept. It is therefore not ultimately determinable in this context whether an international instrument on judicial sales of ships can sufficiently protect the purchaser of a ship in a judicial sale. This might rather be the task of each individual state.

E. Other Possible Solutions

Although some think that the issue of recognition can be solved by creating a new international instrument, there might however be other ways to alleviate the insecure position of parties involved in a judicial sale. The court could, for example, take a more active role in notifying the registry of the ship it is selling and inquire into any possible problems with regard to deregistration of the ship and charges,

[83] The inspiration for the wording was found in the Brussels I Regulation, art. 34 para 1.

[84] CMI Draft Convention on judicial sale of ships, art. 8.3.

[85] M. Bogdan, *Recueil des cours,* Vol. 348, 2010, p. 166.

[86] O. Kahn-Freund, *Recueil des cours*, Vol. 143, 1974, p 173–174. See also Lauterpacht's view in the case The Netherlands v. Sweden (the Boll case), 1958, *ICJ Reports* 1958, p 55.

which could then be part of the conditions of sale. Certainly when the ship registry concerned has the reputation of refusing recognition on a consistent basis, the judge might do all parties a favour by taking this more careful approach. The downside of such approach is that it could be quite time-consuming. Moreover, while this approach would anticipate a possible non-recognition of the ship registry in question, it might not solve the problem of non-recognition by other states.

What a purchaser of a ship in a judicial sale could do in order to protect himself against anyone interfering with his title is to take up insurance that covers his losses that result from a pre-sale claim resting on the ship. Some insurers might offer a so-called "maritime lien insurance for second-hand ships"[87] in order to protect purchasers of ships from financial losses that may result from claims, i.e. maritime liens and *in rem* rights connected to the ship's previous owner. It is however uncertain whether the insurer would also be eager to cover the risk for ships that are registered in a state that is notorious for not recognising a foreign judicial sale and its effects.

Another, rather ideal, solution to the recognition problem would be to eliminate the main differences in the conflict-of-law rules applicable to the existence and ranking of claims in the payout phase by harmonising the laws on the matter.[88] This was attempted already in the 1993 Convention that made a list of all liens and appointed the *lex registrationis* as the law applicable to the ranking of mortgages and charges.[89] This Convention could, if it were successful, overcome the problem that a certain right exists and is highly ranked in the payout order of the state selling the ship but does not exist in the legal order of the recognising jurisdiction. Where claimants enjoy the same ranking in each state, the situation where unsatisfied claimants file a claim against the new owner will be highly unlikely as the same result would be obtained abroad. So far it seems that states want to maintain their competitive status as an enforcing jurisdiction, making a harmonisation on that level quite unlikely.[90] This is mainly why amending the 1993 Mortgages and Liens Convention or adding a protocol might be rather unsuccessful. Moreover, the 1993 Convention has a limited range and covers only judicial sales in the framework of the enforcement of a mortgage or of liens; the Convention does not deal with other

[87] FD&D Cover for MOA Risks, "Writ Search Facility" and Maritime Liens Insurance for Second-hand Ships, 2012–2013 Policy Year, available at www.nepia.com -> publications -> club circulars-> circular 2012/009. See also W. Sharpe, Towards an International Instrument for Recognition of Judicial sales of Ships – Political Aspects, p 3, fn. 5. Available at www.comitemaritime.org -> uploads -> judicial sales -> paper of W. Sharpe. (last visited 02/07/2014).

[88] This could be done, for example, by agreeing that the *lex registrationis* is the law deciding on the existence and ranking of a certain claim.

[89] Mortgages and Liens Convention 1993, art. 2.

[90] See for example Belgium, where the draft of the new maritime code proposes the application of its own domestic law on the existence and ranking of claims instead of applying the more predictable *lex registrationis* as is currently done. See Blauwboek Proeve van Belgisch Scheepsvaartwetboek Privaatrecht, Blauwboek 3 schepen, para 3.385. available at www.zeerecht.be.

claims such as ownership disputes or ship supply claims.[91] Widening the scope of the Convention to all types of maritime claims might be a means of resolving issues regarding the recognition of judicial sales of ships. However, considering the low acceptance of the 1993 Convention, the chance of obtaining an accepted recognition regime under this unification instrument is very minimal.

A more evident solution to this problem perhaps lies at the domestic level: individual states could amend their laws on recognition of judicial sales of ships and adjust deregistration laws accordingly in order to provide a clear recognition framework. Although this might be a long-term solution to the recognition problem, states will have to bring their laws in line with the needs of the fast-paced and global shipping business in order to maintain their competitive status. Individual states are in fact mainly driven in their policies by a number of factors that affect levels of economic activity, fiscal income, employment, and competitiveness. Tools deployed to achieve the formulated public economy goals include not only tax instruments and incentives, labour conditions, and infrastructure, but also the legal regime.[92] When designing a policy to attract maritime economic activity and thereby build the tax base and increase employment, not only outright tax structuring (e.g. tonnage tax) and labour law are paramount but also how difficult or easy it is to transfer assets from one market participant to another regardless of whether the transfer is voluntary or takes place in a judicial sale scenario. The argument can be made that the harder it is to have a ship sale recognised by the flag state, the higher the incentive is for a ship-owner—given he is in need for financing—to flag out to a more reliable registry: the economic rationale being that the ship-owner, located in a jurisdiction that does not recognise foreign sales easily, will struggle to obtain financing on favourable terms under his home flag and might even be forced by prospective financiers to flag out to a more favourable domicile. Although non-recognition of a foreign judicial sale might form an incentive for a ship-owner to register his ship in a registry where he is protected against the loss of his ship, the ship-owner who is in need of financing will be subject to the bank's financing offer that typically includes a provision defining which flags are acceptable to the bank and which are not.[93] Banks, in drafting their loan documentation, might arguably avoid to include those jurisdictions that are known of not recognising foreign judicial sales. Such avoidance of domicile is a tool of economic pressure that serves to make states reconsider their legislation with a view to maintaining their attractiveness as a maritime domicile. This was also the case in Turkey, where the legislator amended—on the initiative of the ship-finance

[91] See Chapter 2.

[92] P. Marlow, 'Ships, flags and taxes', in: C. Th. Grammenos (eds), *The Handbook of Maritime Economics and Business* [London, 2002] 512–529.

[93] See examples of loan documentation and indication memoranda included in the 'Schiffsfinanzierung II' course reading materials. The course was held at the Lehrstuhl für Corporate Finance and Ship Finance at the University of Hamburg. Course available at the website of the 'Lehrstuhl'. http://www.corporate-finance-hamburg.de/ -> Lehre -> WiSe 2013/14 -> documents. Last visited 21/012014.

sector—the rules regarding the non-recognition of foreign judicial sales of Turkish ships.[94] Based on this observation, this author expects that over time the national rules on recognition of foreign judicial sales of ships will converge on a common best practice and establish a level playing field on this matter amongst maritime states.

F. Conclusion

Although most domestic laws provide that a judicial sale of a ship transfers title free and clear of all encumbrances, in some occasions this may not be enough to put the ship's past behind as evidenced in the cases discussed in this chapter. Increasingly, maritime players face problems with regard to the international recognition of judicial ship sales and see it as a threat for the maritime business as a whole. Therefore, legal experts in the field gathered within the CMI to research whether an international instrument would be feasible and appropriate for solving the problems incurred. After 6 years, the working group finalised a Final Draft which was adopted at the CMI Assembly on 17 June 2014 taking place in Hamburg. This chapter has aimed at discussing the material aspects of this Final Draft and has taken a closer look at its *modus operandi*. In the light of the drafter's main objective—the protection of purchasers of ships through judicial sales—the instrument was assessed and some weaknesses have been highlighted. Although the Final Draft certainly needs more development and reconsideration on the international level, it is without doubt a very valuable response of the maritime legal community to address the problems incurred with regard to the world-wide recognition of judicial ship sales. It is however important to be mindful of solutions other than a unifying international instrument. States have in fact sufficient economic reasons to enact reliable legislation for all parties involved in a judicial sale procedure. It might therefore not be unthinkable that over time the national rules on recognition of foreign judicial sales of ships will of their own accord converge on a common best practice to the benefit of the entire maritime industry.

[94] D. Damar 'Neues türkisches Handels-und Transportrecht' in *Transportrecht,* 36(5), 178–191, 189 explaining that it was the ship financing sector taking the initiative to draft new legislation. See also "Chapter 6 -> V. Recognition -> 1. Recognition of the Court Decision."

Chapter 8
Main Conclusions

This comparative study has aimed in the first place at identifying the differences in the judicial sale procedure between various jurisdictions. In so doing, it identified those elements of the judicial ship sale procedure that make certain jurisdictions more attractive for creditors than others. Furthermore, the objective of this comparative study was also to explore the potential to harmonise laws on judicial sales of ships, with a special focus on the CMI's 'Draft International Convention of Foreign Judicial Sales of Ships and their Recognition'.

To accomplish this, the research started in Chapter 2 with an exploration of the main international and European instruments that touch on aspects of the judicial ship sale procedure. Although some aspects have been regulated on the international or the European level, the research conducted in Chapter 2 found that the most important areas connected to judicial sales of ships are covered by neither international nor European law. Each state determines for itself who, for example, may request and what is needed to initiate a judicial sale of a ship. Furthermore, national law has free rein to determine who should be notified of the sale, on which terms the sale takes place, and what effects the sale ultimately has on all the claims. Also, the law determining the existence and ranking of rights over the ship and the recognition given to foreign judicial sales of ships is only to a limited extent harmonised and thus further regulated by national (private international) law.

The lack of a harmonisation of the entire judicial ship sale procedure has resulted in each state having developed its own system dealing with the matter. Some jurisdictions seem to have enacted more favourable laws than others, which often causes lenders to direct the financed ship to a 'friendly' jurisdiction or to wait until the ship calls at a port in such a jurisdiction before initiating a judicial sale procedure. The mobility of a ship and the differences between jurisdictions leads litigants to actively engage in 'forum shopping' with the goal of obtaining a quick and adequate recovery of any invested or lent money and at the same time creating a free and unencumbered title over the sold ship. Chapters 3–5 of this study aimed at identifying these differences in the judicial sale procedure by compiling individual reports on three different jurisdictions: Belgium, the Netherlands, and England and

L. Bleyen, *Judicial Sales of Ships*, Hamburg Studies on Maritime Affairs 36,
DOI 10.1007/978-3-319-24376-4_8

Wales. These three jurisdictions were chosen as the basis of this comparative study since they all have a noteworthy maritime history and feature large ports with considerable maritime traffic, which means that ships routinely frequent their jurisdictional waters. Moreover, it is expected that the procedural peculiarities identified in the national reports will mirror other popular judicial sale fora that share the same legal history and jurisprudence as the discussed states, thus making the comparative study also useful for states other than the discussed ones, as exemplified in the comparative summary of this research.

In order to compare the judicial ship sale regime in the aforementioned jurisdictions, each report examined the various stages in a judicial sale procedure. After discussing the domestic sources of law dealing with judicial sales of ships and briefly addressing the court system in all three jurisdictions, the national reports dealt with the conditions that have to be met before a judicial sale can be initiated in the jurisdictions. As a third element of comparison, each national report discussed the legal preparations required for a judicial sale such as the advertisement of the sale and the valuation of the ship. After that, the national reports focussed on how the judicial sale of ships is conducted in each jurisdiction and shed light on the bidding process and the related procedures. A subsequent element of comparison concentrated on the post-sale phase, addressing the distribution of the sale proceeds among the creditors and the various consequences a judicial sale of a ship can have in the discussed jurisdiction. In the last stage, the national reports took a closer look at the domestic recognition of foreign judicial sales of ships and their effects. This last part analysed to what extent the consequences of judicial sales carried out by foreign courts of a competent jurisdiction are recognised by each of the studied jurisdictions. These areas of comparison were chosen since they reveal best the differences in judicial sales of ships procedure among the aforementioned jurisdictions, which are discussed in the comparative summary of Chapter 6.

The comparative summary focussed primarily on the legal differences identified in the discussed national reports as regards the various stages of a judicial sale procedure. Specifically those elements influencing the popularity of a certain forum's judicial sale procedure were highlighted. As a first comparative aspect affecting the favourableness of a procedure, the comparative summary identified the need of an enforceable title in the discussed civil law jurisdictions as opposed to the possibility of selling the ship pending procedures, the so-called sale *pendente lite* which can be relied on in common law states like England and Wales. This procedural difference typically has an effect on the time frame of the judicial sale and therefore also on the favourableness of a certain forum. When the case is not defended in court and when the ship-owner is financially unable to provide security in order to release the vessel from the arrest, the enforcing creditor e.g. a bunker supplier or the mortgagee, would prefer enforcing his claim in a jurisdiction that allows the ship to be sold pending proceedings in order to avoid losing time awaiting a suitable trial date that would merely decide on a dispute whose outcome is plainly foreseeable. The time-loss incurred by a trial would very likely lead to an impairment of the ship's financial position, which is to the detriment of all parties

involved, ranging from mortgagees and possible cargo-owners to the defaulting ship-owner himself, if he has any residual interest.

The court system might also be an element which would cause a creditor to resort to a certain jurisdiction to enforce his claim(s). In particular, the installation of a specialised maritime chamber or division in certain courts could lead to a more efficient conclusion of a maritime case or a judicial sale procedure. Also, creditors might avoid translating costs by going to a jurisdiction where English i.e. the *lingua franca* of the shipping industry, stands as an official language, as in England, or to a jurisdiction that permits the use of English in cases related to shipping, as in the Netherlands. In any case, a jurisdiction where there is a total intolerance of the use of English, as in Belgium, will usually be less attractive for creditors due to the time and costs required for translation.

The national reports also established that jurisdictions have developed many different methods of judicial sale, some being very efficient like the Dutch and English systems, others being quite time-consuming like the Belgian system. Notwithstanding the various differences in the judicial sale procedure as between jurisdictions, the comparative study evidences that a judicial sale of a ship often remains a lengthy process in all the discussed jurisdictions, entailing various unnecessary costs. The availability of an alternative method of sale that has the same effects as an ordinary judicial sale might play a significant role in the procedural attractiveness of a forum. In this light, the research assessed the possibility of conducting a court-approved private sale in each of the jurisdictions. From the discussed jurisdictions, only the Netherlands has developed the possibility of such an alternative sale procedure. England is a bit hesitant as to the application of such procedure and will only justify a departure from the ordinary course of ordering the appraisement and sale of the ship when special circumstances are found. This could refer to, for example, the opportunity to retain and operate a long-term charter party which would otherwise be lost if the ship was sold through the ordinary English sale procedure. In contrast to both the Netherlands and England, there is no existing case law in Belgium regarding the possibility of selling a ship through a court-approved private sale. Enforcing creditors who are interested in having a court-approved private sale should thus carefully assess where to start enforcement procedures and only select a forum where the court-approved private sale is an established practice of the court.

After a ship is sold by means of a judicial sale and it is envisioned that the sale fund will be insufficient to satisfy all the claims, the court has to decide how the fund will be distributed among the creditors. From the national reports it can be concluded that some jurisdictions have developed a more favourable ranking for certain claimants than other jurisdictions. This can form a source of considerable uncertainty: depending on the jurisdiction in which the ship is sold, a claimant can in fact achieve a different outcome with regard to recovering his claim. This uncertainty is even further complicated by the question of what conflict-of-law rule governs the existence and ranking of foreign claims. Generally, a mortgagee should be mindful of the advantages posed by a forum like England and Wales that

has a limited number of liens outranking his claim and that, moreover, also applies the *lex-fori* rule, thus preventing the infiltration of foreign rights.

All the aforementioned differences might also trigger questions as to the recognition of a judicial sale that took place under the—sometimes conflicting—laws of another state. For this reason, all national reports have also included the issue of recognition of foreign judicial sales of ships. Although all jurisdictions evidence that recognition of a foreign judicial sale decision might very likely be obtained, the absence of any international instrument and the discretion vested in the judge on the matter might result in quite some uncertainty about the international recognition of a judicial sale of a ship, leaving room for parties such as dissatisfied previous owners or claimants to exercise their rights as if these were never extinguished. The uncertainty surrounding the international recognition of foreign judicial sales became even more visible when the comparative summary addressed the issue also in jurisdictions that were not subject to the comparative study, where recognition of a foreign judgment has proven to be not that easily obtained. Following the reasoning as set out in the comparative summary, non-recognition of a judicial sale might have negative implications for all those connected to the judicial sale, such as the ship's financing bank, the other claimants and especially the purchaser of the ship. Also, when a judicial sale is not recognised by the ship's former registry, other registries might not be able to give administrative effect to the foreign judicial sale, certainly taking into consideration that upon new registration a deletion certificate is usually required from the ship's previous registry. The negative implications of the uncertainty around the recognition of a foreign judicial sale engender questions as to the objective and usefulness of judicial sale as a method of enforcement.

As a judicial sale is still the ultimate and most commonly used process to enforce a claim against a ship or ship-owner, some practitioners in the field who are active in the CMI have produced a new draft instrument that would alleviate the insecure position of parties involved in a judicial sale. This instrument, the so-called 'Draft International Convention of Foreign Judicial Sales of Ships and their Recognition', was assessed in Chapter 7 of this research. This assessment found that the CMI's Final Draft certainly has its strengths and that it is no doubt a valuable response of the maritime legal community to address the problems incurred with regard to the world-wide recognition of judicial ship sales. However, as pointed out in Chapter 7, states should also be mindful of solutions other than a unifying international instrument. States have in fact sufficient economic incentives to produce reliable legislation for all parties involved in a judicial sale procedure. It is therefore expected that, notwithstanding the continuing existence of numerous differences between states' judicial sale procedures, over time the domestic laws on recognition of foreign judicial sales of ships will of their own accord converge on a common best practice to the benefit of the maritime industry as a whole.

Annex: Draft International Convention on Foreign Judicial Sales of Ships and Their Recognition (Beijing Draft)

Draft International Convention on Foreign Judicial Sales of Ships and their Recognition (as publicly circulated after the 2014 Hamburg Conference Approval)

Known as the "Beijing Draft"

(Done at Beijing on 19 October 2012, amended at Dublin in 2013 and at Hamburg in 2014)

The States Parties to the present Convention,

RECOGNIZING that the needs of the maritime industry and ship finance require that the Judicial Sale of Ships is maintained as an effective way of securing and enforcing maritime claims and the enforcement of judgments or arbitral awards or other enforceable documents against the Owners of Ships;

CONCERNED that any uncertainty for the prospective Purchaser regarding the international Recognition of a Judicial Sale of a Ship and the deletion or transfer of registry may have an adverse effect upon the price realised by a Ship sold at a Judicial Sale to the detriment of interested parties;

CONVINCED that necessary and sufficient protection should be provided to Purchasers of Ships at Judicial Sales by limiting the remedies available to interested parties to challenge the validity of the Judicial Sale and the subsequent transfers of the ownership in the Ship;

CONSIDERING that once a Ship is sold by way of a Judicial Sale, the Ship should in principle no longer be subject to arrest for any claim arising prior to its Judicial Sale;

CONSIDERING further that the objective of Recognition of the Judicial Sale of Ships requires that, to the extent possible, uniform rules are adopted with regard to the notice to be given of the Judicial Sale, the legal effects of that sale and the de-registration or registration of the Ship.

L. Bleyen, *Judicial Sales of Ships*, Hamburg Studies on Maritime Affairs 36,
DOI 10.1007/978-3-319-24376-4

HAVE AGREED as follows:

Article 1 Definitions

For the purposes of this Convention:

1. "Certificate" means the original duly issued document, or a certified copy thereof, as provided for in Article 5.
2. "Charge" includes any charge, Maritime Lien, lien, encumbrance, claim, arrest, attachment, right of retention or any other rights whatsoever and howsoever arising which may be asserted against the Ship.
3. "Clean Title" means a title free and clear of any Mortgage/Hypothèque or Charge unless assumed by any Purchaser.
4. "Competent Authority" means any Person, Court or authority empowered under the law of the State of Judicial Sale to sell or transfer or order to be sold or transferred, by a Judicial Sale, a Ship with Clean Title.
5. "Court" means any judicial body established under the law of the state in which it is located and empowered to determine the matters covered by this Convention.
6. "Day" means calendar day.
7. "Interested Person" means the Owner of a Ship immediately prior to its Judicial Sale or the holder of a registered Mortgage/Hypothèque or Registered Charge attached to the Ship immediately prior to its Judicial Sale.
8. "Judicial Sale" means any sale of a Ship by a Competent Authority by way of public auction or private treaty or any other appropriate ways provided for by the law of the State of Judicial Sale by which Clean Title to the Ship is acquired by the Purchaser and the proceeds of sale are made available to the creditors.
9. "Maritime Lien" means any claim recognized as a maritime lien or privilège maritime on a Ship by the law applicable in accordance with the private international law rules of the State of Judicial Sale.
10. "Mortgage/Hypothèque" means any mortgage or hypothèque effected on a Ship in the State of Registration and recognized as such by the law applicable in accordance with the private international law rules of the State of Judicial Sale.
11. "Owner" means any Person registered in the register of ships of the State of Registration as the owner of the Ship.
12. "Person" means any individual or partnership or any public or private body, whether corporate or not, including a state or any of its constituent subdivisions.
13. "Purchaser" means any Person who acquires ownership in a Ship or who is intended to acquire ownership in a Ship pursuant to a Judicial Sale.
14. "Recognition" means that the effect of the Judicial Sale of a Ship shall be accepted by a State party to be the same as it is in the State of Judicial Sale.
15. "Registered Charge" means any Charge entered in the registry of the Ship that is the subject of the Judicial Sale.
16. "Registrar" means the registrar or equivalent official in the State of Registration or the State of Bareboat Charter Registration, as the context requires.
17. "Ship" means any ship or other vessel capable of being an object of a Judicial Sale under the law of the State of Judicial Sale.

18. "State of Registration" means the state in whose register of ships ownership of a Ship is registered at the time of its Judicial Sale.
19. "State of Judicial Sale" means the state in which the Ship is sold by way of Judicial Sale.
20. "State of Bareboat Charter Registration" means the state which granted registration and the right to fly temporarily its flag to a Ship bareboat chartered-in by a charterer in the said state for the period of the relevant charter.
21. "Subsequent Purchaser" means any Person to whom ownership of a Ship has been transferred through a Purchaser.
22. "Unsatisfied Personal Obligation" means the amount of a creditor's claim against any Person personally liable on an obligation, which remains unpaid after application of such creditor's share of proceeds actually received following and as a result of a Judicial Sale.

Article 2 Scope of Application

This Convention shall apply to the conditions in which a Judicial Sale taking place in one state shall be sufficient for recognition in another state.

Article 3 Notice of Judicial Sale

1. Prior to a Judicial Sale, the following notices, where applicable, shall be given, in accordance with the law of the State of Judicial Sale, either by the Competent Authority in the State of Judicial Sale or by one or more parties to the proceedings resulting in such Judicial Sale, as the case may be, to:

   (a) The Registrar of the Ship's register in the State of Registration;
   (b) All holders of any registered Mortgage/Hypothèque or Registered Charge provided that these are recorded in a ship registry in a State of Registration which is open to public inspection, and that extracts from the register and copies of such instruments are obtainable from the registrar;
   (c) All holders of any Maritime Lien, provided that the Competent Authority conducting the Judicial Sale has received notice of their respective claims; and
   (d) The Owner of the Ship.

2. If the Ship subject to Judicial Sale is flying the flag of a State of Bareboat Charter Registration, the notice required by paragraph 1 of this Article shall also be given to the Registrar of the Ship's register in such State.
3. The notice required by paragraphs 1 and 2 of this Article shall be given at least 30 Days prior to the Judicial Sale and shall contain, as a minimum, the following information:

   (a) The name of the Ship, the IMO number (if assigned) and the name of the Owner and the bareboat charterer (if any), as appearing in the registry records (if any) in the State of Registration (if any) and the State of Bareboat Charter Registration (if any);
   (b) The time and place of the Judicial Sale; or if the time and place of the Judicial Sale cannot be determined with certainty, the approximate time and anticipated place of the Judicial Sale which shall be followed by

additional notice of the actual time and place of the Judicial Sale when known but, in any event, not less than 7 Days prior to the Judicial Sale; and

(c) Such particulars concerning the Judicial Sale or the proceedings leading to the Judicial Sale as the Competent Authority conducting the proceedings shall determine are sufficient to protect the interests of Persons entitled to notice.

4. The notice specified in paragraph 3 of this Article shall be in writing, and given in such a way not to frustrate or significantly delay the proceedings concerning the Judicial Sale:

   (a) either by sending it by registered mail or by courier or by any electronic or other appropriate means to the Persons as specified in paragraphs 1 and 2; and
   (b) by press announcement published in the State of Judicial Sale and in other publications published or circulated elsewhere if required by the law of the State of Judicial Sale.

5. Nothing in this Article shall prevent a State Party from complying with any other international convention or instrument to which it is a party and to which it consented to be bound before the date of entry into force of the present Convention.
6. In determining the identity or address of any Person to whom notice is required to be given other parties and the Competent Authority may rely exclusively on information set forth in the register in the State of Registration and if applicable in the State of Bareboat Registration or as may be available pursuant to Article 3 (1)(c).
7. Notice may be given under this Article by any method agreed to by a Person to whom notice is required to be given.

Article 4 Effect of Judicial Sale

1. Subject to:

   (a) the Ship being physically within the jurisdiction of the State of Judicial Sale, at the time of the Judicial Sale; and
   (b) the Judicial Sale having been conducted in accordance with the law of the State of Judicial Sale and the provisions of this Convention, any title to and all rights and interests in the Ship existing prior to its Judicial Sale shall be extinguished and any Mortgage/Hypothèque or Charge, except as assumed by the Purchaser, shall cease to attach to the Ship and Clean Title to the Ship shall be acquired by the Purchaser.

2. Notwithstanding the provisions of the preceding paragraph, no Judicial Sale or deletion pursuant to paragraph 1 of Article 6 shall extinguish any rights including, without limitation, any claim for Unsatisfied Personal Obligation, except to the extent satisfied by the proceeds of the Judicial Sale.

Article 5 Issuance of a Certificate of Judicial Sale

1. When a Ship is sold by way of Judicial Sale and the conditions required by the law of the State of Judicial Sale and by this Convention have been met, the Competent Authority shall, at the request of the Purchaser, issue a Certificate to the Purchaser recording that

   (a) the Ship has been sold to the Purchaser in accordance with the law of the said State and the provisions of this Convention free of any Mortgage/Hypothèque or Charge, except as assumed by the Purchaser; and
   (b) any title to and all rights and interests existing in the Ship prior to its Judicial Sale are extinguished.

2. The Certificate shall be issued substantially in the form of the annexed model and shall contain the following minimum particulars:

   i. The State of Judicial Sale;
   ii. The name, address and, unless not available, the contact details of the Competent Authority issuing the Certificate;
   iii. The place and date when Clean Title was acquired by the Purchaser;
   iv. The name, IMO number, or distinctive number or letters, and port of registry of the Ship;
   v. The name, address or residence or principal place of business and contact details, if available, of the Owner(s);
   vi. The name, address or residence or principal place of business and contact details of the Purchaser;
   vii. Any Mortgage/Hypothèque or Charge assumed by the Purchaser;
   viii. The place and date of issuance of the Certificate; and
   ix. The signature, stamp or other confirmation of authenticity of the Certificate

Article 6 Deregistration and Registration of the Ship

1. Upon production by a Purchaser or Subsequent Purchaser of a Certificate issued in accordance with Article 5, the Registrar of the Ship's registry where the Ship was registered prior to its Judicial Sale shall delete any registered Mortgage/Hypothèque or Registered Charge, except as assumed by the Purchaser, and either register the Ship in the name of the Purchaser or Subsequent Purchaser, or delete the Ship from the register and issue a certificate of deregistration for the purpose of new registration, as the Purchaser may direct.
2. If the Ship was flying the flag of a State of Bareboat Charter Registration at the time of the Judicial Sale, upon production by a Purchaser or Subsequent Purchaser of a Certificate issued in accordance with Article 5, the Registrar of the Ship's registry in such State shall delete the Ship from the register and issue a certificate to the effect that the permission for the Ship to register in and fly temporarily the flag of the State has been withdrawn.
3. If the Certificate referred to in Article 5 is not issued in an official language of the State in which the abovementioned register is located, the Registrar may request

the Purchaser or Subsequent Purchaser to submit a duly certified translation of the Certificate into such language.
4. The Registrar may also request the Purchaser or Subsequent Purchaser to submit a duly certified copy of the said Certificate for its records.

Article 7 Recognition of Judicial Sale

1. Subject to the provisions of Article 8, the Court of a State Party shall, on the application of a Purchaser or Subsequent Purchaser, recognize a Judicial Sale conducted in any other state for which a Certificate has been issued in accordance with Article 5, as having the effect:

   (a) that Clean Title has been acquired by the Purchaser and any title to and all the rights and interests in the Ship existing prior to its Judicial Sale have been extinguished; and
   (b) that the Ship has been sold free of any Mortgage/Hypothèque or Charge, except as assumed by the Purchaser.

2. Where a Ship which was sold by way of a Judicial Sale is sought to be arrested or is arrested by order of a Court in a State Party for a claim that had arisen prior to the Judicial Sale, the Court shall dismiss, set aside or reject the application for arrest or release the Ship from arrest upon production by the Purchaser or Subsequent Purchaser of a Certificate issued in accordance with Article 5, unless the arresting party is an Interested Person and furnishes proof evidencing existence of any of the circumstances provided for in Article 8.
3. Where a Ship is sold by way of Judicial Sale in a state, any legal proceeding challenging the Judicial Sale shall be brought only before a competent Court of the State of Judicial Sale and no Court other than a competent Court of the State of Judicial Sale shall have jurisdiction to entertain any action challenging the Judicial Sale.
4. No Person other than an Interested Person shall be entitled to take any action challenging a Judicial Sale before a competent Court of the State of Judicial Sale, and no such competent Court shall exercise its jurisdiction over any claim challenging a Judicial Sale unless it is made by an Interested Person. No remedies shall be exercised either against the Ship the subject of the Judicial Sale or against any *bona fide* Purchaser or Subsequent Purchaser of that Ship.
5. In the absence of proof that a circumstance referred to in Article 8 exists, a Certificate issued in accordance with Article 5 shall constitute conclusive evidence that the Judicial Sale has taken place and has the effect provided for in Article 4, but shall not be conclusive evidence in any proceeding to establish the rights of any Person in any other respect.

Article 8 Circumstances in Which Recognition May Be Suspended or Refused

Recognition of a Judicial Sale may be suspended or refused only in the circumstances provided for in the following paragraphs:

1. Recognition of a Judicial Sale may be refused by a Court of a State Party, at the request of an Interested Person if that Interested Person furnishes to the Court proof that at the time of the Judicial Sale, the Ship was not physically within the jurisdiction of the State of Judicial Sale.

2. Recognition of a Judicial Sale may be

   a) suspended by a Court of a State Party, at the request of an Interested Person, if that Interested Person furnishes to the Court proof that a legal proceeding pursuant to paragraph 3 of Article 7 has been commenced on notice to the Purchaser or Subsequent Purchaser and that the competent Court of the State of Judicial Sale has suspended the effect of the Judicial Sale; or
   b) refused by a Court of a State Party, at the request of an Interested Person, if that Interested Person furnishes to the Court proof that the competent Court of the State of Judicial Sale in a judgment or similar judicial document no longer subject to appeal has subsequently nullified the Judicial Sale and its effects, either after suspension or without suspension of the legal effect of the Judicial Sale.

3. Recognition of a Judicial Sale may also be refused if the Court in a State Party in which Recognition is sought finds that Recognition of the Judicial Sale would be manifestly contrary to the public policy of that State Party.

Article 9 Reservation
State parties may by reservation restrict application of this Convention to recognition of Judicial Sales conducted in State Parties.

Article 10 Relations with Other International Instruments
Nothing in this Convention shall derogate from any other basis for the Recognition of Judicial Sales under any other bilateral or multilateral Convention, Instrument or agreement or principle of comity.

[Final clauses in respect of signature, ratification, acceptance, approval, accession, denunciation, coming into force, language, amendment etc. shall be drafted later and separately]

ANNEX

Certificate

Issued in accordance with the provisions of Article 5 of the International Convention on Foreign Judicial Sales of Ships and their Recognition

This is to certify that the Ship described below has been sold by way of Judicial Sale and all conditions required by the law of the State of Judicial Sale and by the International Convention on Foreign Judicial Sales of Ships and their Recognition (the "Convention") have been met, and that Clean Title as defined by the Convention has been transferred to the named Purchaser and any title to and all rights and interests in the Ship existing prior to the Judicial Sale are extinguished and any Mortgage or Charge, except as assumed by the Purchaser, shall cease to attach to the Ship.

1. **State of Judicial Sale**. . . . . .

. .. .

2. **Competent Authority issuing this Certificate**

2.1 Name. . . . . .

. . . . . .

2.2 Address. . . . .

. . . . . .

2.3 Telephone/fax/email, if available. . . . . .

. . . . . .

2.4 Place and date Clean Title acquired by Purchaser

. . . . . .

3. **Ship**

3.1 Name. . . . . .

. . . .

3.2 IMO number or Distinctive number or letters

. . . . . .

3.3 Place of issuance of the distinctive number or letters. . . . . .

. . . . . .

3.4 Port of registry . . . . . .

. . . . . .

4. Owner(s)

4.1 Name. . . . . .

. . . . . .

4.2 Address or residence or principal place of business. . . . . .

. . . . . .

4.3 Telephone/fax/email. . . . . .

. . . . . .

5. Purchaser

5.1 Name. . . . . .

. . . . . .

5.2 Address or residence or principal place of business. . . . . .

. . . . . .

5.3 Telephone/fax/email. . . . . .

. . . . . .

6. Holder of the Assumed Mortgage/Hypothèque or Charge

6.1 Name. . . . . .

. . . . . .

6.2 Address or residence or principal place of business. . .. .

. . ..

6.3Telephone/fax/email. . . . . .

. . . . . .

6.4 Maximum amount of each Mortgage/Hypothèque or Charge assumed by the Purchasser (if available) . . . . . .

. . . .

At. . . . ., **On**. . . . . .

. . . . . .

(place) (date)

. . . .

. . . . . .

Signature and/or stamp

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