JUDICIAL SALES AND THE NEW CONVENTION

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1. Introduction

An Australian court is empowered to conduct a judicial sale of a ship under arrest in connection with the enforcement of a maritime claim.[1] Any Australian maritime lawyer will tell you without hesitation that a judicial sale in an action in rem extinguishes any claims, liens, or encumbrances in respect of a vessel and transfers those claims to the proceeds of the sale of the vessel held by the court.[2] Thus, an important consequence of a judicial sale is that the purchaser obtains clean title valid against the world.[3]

Although clean title is conferred in the jurisdiction in which the ship is sold, the picture becomes more complex when one has regard to the international nature of maritime commerce. A ship may be registered in one jurisdiction, with creditors based in another, and judicially sold in yet a third jurisdiction. This inevitably invites consideration of private international law issues. Can purchasers rely on clean title conferred by a judicial sale being recognised and enforced in a jurisdiction other than the *lex executionis*?

The drafters of the new *United Nations Convention on the International Effects of Judicial Sales of Ships* ('*Beijing Convention*')[4] thought that sufficient doubt attended that question to merit the establishment of a harmonised international regime governing the consequences of judicial sales.

This paper considers the nature of judicial sales and the private international law problems that can arise from them. It then provides an overview of the key provisions of the *Beijing Convention* and the implications for Australia, including what legislative changes may be required if Australia ratifies the Convention.

2. Judicial Sale in Australia

The power of an Australian court to conduct a judicial sale is implied in the *Admiralty Act 1988* (Cth), although that instrument does not refer explicitly to the effect of judicial sale or the concept of clean title. A court's power to order the sale of a ship is made express in Part X of the *Admiralty Rules 1988* (Cth). Rule 69(1) provides that upon application a court may order that a ship under arrest be valued and sold or sold without valuation and provides that such an order can be made either before or after final judgment. Rule 69(5) provides that if the ship is deteriorating in value, the court may order that it be sold without an application. Rule 70(1) provides that the sale of a ship must be conducted by the Marshal, and rule 70(2) confers a wide discretion upon the court as to the procedure of the sale. However, like the *Admiralty Act*, the *Admiralty Rules* are silent as to the effect of a judicial sale conferring clean title. The silence of those legislative instruments as to clean title may stem from the fact that the Australian Law Reform Commission's ('ALRC') Report on Civil Admiralty Jurisdiction, which was the precursor to Australia's first Admiralty Act independent of British colonial legislation, also makes no mention of clean title.[5]

It cannot, however, be doubted that a judicial sale by an Australian court confers clean title. Given the longevity and widespread acceptance of the established principle in English admiralty law that a judicial sale confers clean title, express words would have been necessary to effect a change to that position in Australian law: see *Readhead v Admiralty Marshal, Western Australia District Registry* (1998) 87 FCR 229, 238–42 ('*The Aliza Glacial*).

The silence of the *Admiralty Act*, *Admiralty Rules*, and the ALRC Report on this point perhaps reflects that clarification was not considered necessary. In any event, the consequence of a judicial sale conferring clean title is reflected in other documents which are essential to the effecting of a judicial sale in practice. The Admiralty

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[1] See *Admiralty Rules 1988* (Cth) r 69.
[2] SC Derrington and JM Turner, *The Law and Practice of Admiralty Matters* (Oxford University Press, 2nd ed, 2016) 178–9 [7.67].
[3] *The Tremont* (1841) 1 Wm Rob 163; 166 ER 534, 534. See also D Jackson, *Enforcement of Maritime Claims* (Routledge, 4th ed, 2005) 27.32.
[4] *United Nations Convention on the International Effects of Judicial Sales of Ships*, opened for signature 5 September 2023, 63(1) ILM 78 (not yet in force) ('*Beijing Convention*').
[5] Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (Report No 33, December 1986).

Marshal's standard conditions of sale provide that 'the effect under Australian law of this judicial sale is to **free the ship from all liens and encumbrances**'.

Similarly, the Protocol of Delivery and Acceptance provides that 'the effect under Australian law of this judicial sale is that the ship has been **freed from all encumbrances, mortgages and maritime liens or any other debts or claims whatsoever**'. The Bill of Sale contains a provision expressed in similar terms.

2.1 Title Free of All Liens and Encumbrances

The conferral of clean title is a key advantage of a judicial sale compared with a private sale.[6] In a private sale, maritime liens and some other claims survive the transfer of ownership of the vessel whereas a judicial sale confers unencumbered title.[7] As a consequence, it is likely that a judicial sale will result in a higher sale price to the benefit of the ship's creditors—the higher the sale price, the greater the value of creditors' claims that will be capable of being paid out of the fund, including potentially those creditors whose claims fall lower in the ranking of priorities.[8] The notion of clean title thus underlies the rationale of a judicial sale and has done for centuries: see *The Turtle Bay* [2013] SGHC 165, [12]–[13] (Ang Saw Ean J) for a historical overview.

One of the earliest pronouncements of clean title is found in the *Ordonnance de la Marine* of 1681 of Louis XIV in France, which provides:

> All ships and other vessels may be arrested and disposed of under law; and all privileges and hypothecs will be purged by the decree…[9]

Almost two centuries later, Dr Lushington gave authoritative expression to the place of clean title in English maritime law as follows:

> The jurisdiction of the Court in these matters 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.[10]

In *The Aliza Glacial*, Ryan J made it clear that in Australian law

> a sale by the marshal pursuant to an order of a Court of Admiralty made within jurisdiction confers on the purchaser an unencumbered title which is good against the whole world.[11]

There are important policy reasons why judicial sale by a court should give clean title.[12] First, clean title protects an innocent purchaser from falling prey to hidden costs associated with defending their interest against a prior claim on the vessel. Secondly, the conferral of clean title helps to ensure that a ship is sold for its true market value, to the benefit of all creditors with an interest in the fund. If clean title conferred by a judicial sale is not recognised, or there is a perceived risk that it will not be recognised, then the sale prices that may be expected to be achieved would diminish. Justice Hewson explained the challenge as follows in *The Acrux* [1962] 1 Lloyd's Rep 405, 409:

> 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 interests 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 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 market price for the ship, and the resultant fund, if the ship were sold, would be minimized and not represent her true

[6] *The Turtle Bay* [2013] SGHC 165, [11] (Ang Saw Ean J).
[7] L Bleyen, *Judicial Sales of Ships: A Comparative Study* (Springer, 2016) 153.
[8] Ibid.
[9] Book I, Title XIV, Art 1:1.
[10] *The Tremont* (n 3).
[11] *Readhead v Admiralty Marshal, Western Australia District Registry* (1998) 87 FCR 229, 239, 242 ('*The Aliza Glacial*').
[12] In some civil law jurisdictions, a judicial sale can be conducted that does not confer clean title (a point to which we will return in assessing the *Beijing Convention*) but such sales are foreign to English and Australian common law.

> value.

To this, Sheen J added the following in *The Cerro Colorado* [1993] 1 Lloyd's Rep 58, 61:

> From time to time almost every shipowner wants to borrow money from his bank and give as security a mortgage on a ship. The value of that security would be drastically reduced if, when it came to be sold by the Court there was any doubt as to whether the purchaser from the Court would get a title free of encumbrances and debts.

2.2 The Necessary Conditions for Recognition of a Foreign Sale Free of Liens and Encumbrances

Where the law of the flag and the *lex executionis* differ, a purchaser's enjoyment of the benefits of clean title may depend on foreign courts' recognition of the effect of a foreign judicial sale.[13] This presents an imperative for international legal coordination.

In English and Australian law, there are two conditions that must be satisfied before a court will recognise a foreign judicial sale. These conditions were formulated by Blackburn J of the Court of Exchequer Chamber and subsequently approved by the House of Lords in *Castrique v Imrie* (1870) LR 4 HL 414. In that case, an English court was called upon to recognise the effect of a judicial sale of a vessel by a foreign court. An English company had been a registered mortgagee of the ship the *Ann Martin*. A bill had been drawn on the owner of the ship for supplies, which had subsequently been endorsed to a French company. The bill was dishonoured on maturity and the French company arrested the ship at Le Havre. A French court ordered the sale of the *Ann Martin*, and the respondent purchased her. The mortgagee challenged the sale in the French court but failed. The appellant mortgagee then commenced litigation in England against the respondent purchaser for conversion to recover the ship. It was argued that the French court had misapplied English law in its handling of the English mortgagee's claim.

Justice Blackburn set out a two-limbed test for recognition of a foreign judicial sale as follows:

> We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world.

The *Castrique v Imrie* test is consistent with established private international law principles that a judgment in rem is conclusive against all the world[14] and that the *lex situs* of a chattel at the relevant time governs transfer of ownership.[15] Although there is a view that the *lex situs* of a ship should be taken to be its port of registry,[16] the better view is that that only applies when the vessel is on the high seas or at an unknown place, or, perhaps, at some incidental place, and not when it is in port.[17]

The type of recognition afforded to a foreign judicial sale is recognition of its effect: recognition of the clean title that the sale ordered under the judgment has conferred on the purchaser. When a court is called upon by a purchaser to recognise a foreign judicial sale that has resulted from a foreign judgment in rem, it is 'in reality relying on its title rather than the source of it—the judgment. It is, in other words, relying on the foreign judgment qua an assignment rather than qua a judgment.'[18]

Foreign judicial sales are recognised as 'part of the comity of nations'.[19] In addition to the two limbs of the *Castrique v Imrie* test (the ship was in the lawful control of the State of judicial sale and the court ordering the sale acted within its jurisdiction) there are an additional four qualifications to the recognition of a foreign judicial

[13] P Myburgh, 'International Recognition of Judicial Ship Sales: English Common Law and the Beijing Convention' (2022) 28(6) *Journal of International Maritime Law* 410, 413.
[14] *PE Bakers Pty Ltd v Yehuda* (1988) 15 NSWLR 437, 442. See also *Cammell v Sewell* (1860) 5 H&N 728, 746; 157 ER 1371; Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws* (16th ed, Sweet & Maxwell, 2022) vol 1, [14-110] ('*Dicey, Morris & Collins*').
[15] *Dicey, Morris & Collins* (n 14) vol 2, [25R-001].
[16] *Tisand Pty Ltd v Owners of the Ship MV Cape Moreton (ex Freya)* (2005) 143 FCR 43, 79 [141] (Ryan and Allsop JJ).
[17] *Dicey, Morris & Collins* (n 14) vol 2, [23-057].
[18] Ibid vol 1, [14-110].
[19] *The Acrux* [1962] 1 Lloyd's Rep 405, 409 (Hewson J).

sale at common law. These four qualifications are generally applicable principles of private international law, being: (1) the judgment ordering the sale must be final and conclusive according to the law of the jurisdiction in which it was given; (2) the sale must not offend the public policy of the jurisdiction in which the sale is sought to be recognised; (3) the sale must not have been procured through a violation of principles of natural justice; and (4) the sale must not have been procured by fraud, although the standard of fraud is high in the context of a foreign judicial sale where the validity of the sale itself is a matter determined by the *lex situs*.[20]

3. Problems Can and Do Arise

Notwithstanding that the legal effect of a judicial sale as conferring clean title amounts to a 'general principle' of international maritime law[21] recognised by common and civil law countries,[22] problems can and do arise regarding recognition of foreign judicial sales. In addition to nationally disparate rules for securing registration and de-registration of ships, the inability to date of the international community to harmonise rules on the determination of priorities in the distribution phase following a judicial sale has enabled disgruntled creditors to take tactical advantage of divergences in national legal systems. A creditor may choose not to participate in a priority hearing in a certain jurisdiction and later attempt to commence proceedings elsewhere where the priority regime is more favourable to their interests.[23]

Those who agitated for an international convention on the judicial sale of ships consistently pointed to a dozen or so cases where parties encountered challenges following a judicial sale.[24] It is worthwhile to survey those cases to understand the specific issues that arose and which the *Beijing Convention* aims to address. We will consider them in chronological order.

3.1 *The Tremont* (1841) 1 Wm Rob 163; 166 ER 534 (England)

The *Tremont*, which was registered in the United States, was sold in bottomry in Liverpool. The purchaser refused to complete the purchase until the United States register was amended and sought orders against the United States Consul to procure the amendment of the register. The purchaser's motion was dismissed by Dr Lushington to avoid suggesting any doubt that the title conferred by the English courts is not clean title. The amendment of the register was not necessary to confirm the purchaser's title because the title was sufficiently established by the document issued by the court decreeing the sale under which the purchase was made.

3.2 *The Acrux* [1962] 1 Lloyd's Rep 405 (England)

The *Acrux* was registered in Italy and mortgaged to an Italian bank. It was arrested and sold by judicial sale in England. The mortgagee sought judgment against the sale fund but maintained registration of its mortgage and the right to subsequently arrest the vessel. The English court heard evidence that an order for sale of the English Admiralty Court was not recognised in Italy and that, according to Italian law, the mortgagee could proceed against the ship in any country. Mr Justice Hewson held that to claim on the fund was to adopt and approbate the process of the court and refused to enter judgment for the mortgagee until the court was provided with an undertaking that the mortgagee would not proceed elsewhere against the ship in respect of any unsatisfied balances of its claim nor institute equivalent proceedings against the *Acrux* anywhere else in respect of its claim.

3.3 *The Galaxias* [1989] 1 FC 386 (Canada)

The *Galaxias* was registered in Greece. It was arrested and sold in Vancouver to a purchaser who wished to trade in Greece. The Greek Minister for Merchant Marine refused to issue a certificate of deletion from the Greek register unless the claims of NAT, a Greek Government agency responsible for seamen's pensions and other benefits, were satisfied in full by the Canadian court. In the face of the Greek Minister's position, the purchaser was for all practical purposes prevented from sailing the ship into Greek waters until the registration issue was resolved. Justice Rouleau of the Federal Court of Canada recognised NAT's maritime lien but ordered that all

[20] Y Shao et al, 'Recognition of Foreign Judicial Sales of Ships and Private International Law' (2022) 28(3) *Journal of International Maritime Law* 166.
[21] *The Tremont* (n 3).
[22] Shao et al (n 20) 166, 173–7. See also Yan Erik Potschke 'Judicial Sale of Ships in Germany as an Example for a Civil Law Concept' [2013] *CMI Yearbook* 143; Giorgio Berlingieri 'Judicial Sales of Vessels and Priority of Claims' in C Breitzke and JS Lux (eds) *Maritime Law Handbook* (Kluwer, 2019). For Chinese law see M Sachs and Y Sun 'Judicial Sales of Vessels and Priority of Claims' in C Breitzke and JS Lux (eds) *Maritime Law Handbook* (Kluwer, 2019).
[23] Bleyen (n 7) 153.
[24] Myburgh (n 13) 423.

amounts owing to NAT be held by the court until a valid deletion certificate sufficient to release the *Galaxias* from any and all claims outstanding against it in the Greek registry was furnished to the court and made costs orders against NAT in view of the fact that its conduct was 'tantamount to blackmail'.

3.4 *The Cerro Colorado* [1993] 1 Lloyd's Rep 58 (England)

The English Admiralty Court ordered that the *Cerro Colorado* be appraised for sale following judgment for the mortgagee. Before sale orders could be made, the Admiralty Marshal was notified by the Spanish Embassy that the purchaser of the vessel might find that clean title would not be recognised in Spain and that the vessel could be arrested again due to substantial claims by the crew for arrears of pay and severance pay. Spain's Consul General told the Marshal that Spain would not recognise the English Court's sale of the ship unless the new purchaser guaranteed full payment to the Spanish crew members. An advertisement was published in *Lloyd's List* referring to the forthcoming sale of the ship and warning potential purchasers that the ship was 'encumbered with several seizures' the enforcement of which 'shall remain prevailing notwithstanding any sale under the Orders of Admiralty'. The Marshal applied to the Court for further directions and clarification of the legal effect of a sale order. Mr Justice Sheen stressed that a judicial sale gives the purchaser a title free of all liens and encumbrances and expressed his hope that a Spanish court would, as a matter of comity, recognise orders made by the English courts. Mr Justice Sheen noted that the publication in *Lloyd's List* could amount to contempt of court and that although the crew would ordinarily enjoy priority, this could be upset by contempt.

3.5 *The Monte Alto* (1993) SCOSA E40 (South Africa)

The *Monte Alto* was registered in Brazil and mortgaged to the Brazilian Government. It was arrested and sold at Durban. The former owner was notified of the sale proceedings but the mortgagee was not. In Brazil, the cancellation of the ship's registration was opposed by the mortgagee and refused by the registry and the Brazilian court. The former owner and mortgagee claimed against the sale fund in South Africa. The purchasers sought to attach those claims to found jurisdiction in South Africa against the former owner and mortgagee, asserting damages for contempt of court, but the attachments were refused. The South African court held that it was the purchaser's obligation to attend to deletion of the vessel's previous registration and the previous owner and mortgagee were not in contempt of the sale order for refusing to cooperate.

3.6 *The Mega S* [2003] ZAWCHC 24; 2007 (3) SA 202 (C) (South Africa)

The *Mega S* was registered in Türkiye. A 'pledge right' for bunkers sold and delivered was recorded on the Turkish register. The vessel was arrested and judicially sold in Denmark on the application of the mortgagee, a German bank, which sale conferred clean title under Danish law. The purchaser validly registered the ship in Malta notwithstanding the continuing registration in Türkiye. The ship was then arrested and judicially sold in Cape Town. A claim was made against the South African sale fund by the party in whose favour the pledge right was registered on the Turkish register. The South African court held that the sale by the Danish court had conferred clean title and so the pledge right was no longer valid and to uphold the claim pursuant to the pledge right would 'undermine the comity of nations and would be contrary to both international and South African public policy'.

3.7 *Goldfish Shipping, SA v HSH Nordbank AG* (2010) 377 Fed Appx 150 (USA)

The *Ahmet Bey* was registered in Türkiye and mortgaged to HSH Nordbank. The bank foreclosed by arrest and judicial sale in the United States with Goldfish Shipping purchasing the vessel. The former owner arrested the vessel in Spain and Italy alleging that the sale in the United States was illegal under Turkish law. Goldfish Shipping brought proceedings in the United States against HSH Nordbank for damages, alleging that the bank had failed to delete the vessel's registration in Türkiye and so caused the vessel to be delivered without clean title. The Court dismissed Goldfish Shipping's claims holding that a judicial sale in the United States 'gives to the title made under its decrees validity against all the world'. The consequence of the judicial sale was the extinguishment of all previous rights in the vessel, including those of the former owner and the bank. As such the bank had no duty to take any additional steps to clear title. The continued registration of the vessel in Türkiye had no bearing on the legal status of Goldfish Shipping's title, and the party at fault was the former owner who was interfering with the new purchaser's enjoyment of the vessel, not the bank.

3.8 *SPV Sam Dragon Inc v GE Transportation Finance (Ireland) Ltd* [2012] IEHC 240 (Ireland)

The *Pretty Flourish* (later renamed *Sam Dragon*) was registered in South Korea and mortgaged to an Irish bank. The vessel was arrested and sold in Belgium, with the judicial sale conferring clean title under Belgian law. There was a delay in the bank cancelling its registered mortgage in South Korea and a consequential delay in the cancellation of the South Korean registration. Because of the delay, the new owners had to register with a flag of convenience and incurred expenses in doing so. The new owners sued the bank in tort claiming for the bank's failure to disclose that it did not intend deleting its mortgage in South Korea and its failure to delete the mortgage. The Irish court held that a mortgagee does not make any representation in applying for a judicial sale and that there was no duty on a mortgagee to delete its mortgage following a judicial sale.

3.9 *The Phoenix* [2014] 1 Lloyd's Rep 449 (St Vincent and the Grenadines)

Ownership and a mortgage over the *Phoenix* were registered in the ship registry of St Vincent and the Grenadines. The vessel was arrested and judicially sold in North Korea (where the vessel was on-sold to Vostok) and later in China (where the vessel was on-sold to Apex). Vostok and Apex sought relief in St Vincent and the Grenadines to deregister the vessel, which was opposed by the mortgagee. The mortgagee contended that it had not been paid and that its interest remained registered. The Eastern Caribbean Supreme Court of Appeal held that upon the establishment of a judicial sale fund, the mortgagee's lien attached to the fund and that clean title was conferred upon the purchasers of the North Korean and Chinese judicial sales under the relevant applicable law. The Court found that there was no evidence of a breach of natural justice or fraud in connection with either sale (the mortgagee was aware of both of the judicial sales and had participated in the Chinese judicial sale) and therefore the mortgagee's registration in St Vincent and the Grenadines should be cancelled.

3.10 *The Bright Star* [2023] App Civ 846/18/2 (Malta)

The *Bright Star* was arrested and judicially sold in Jamaica, that sale conferring clean title on the purchaser. The vessel was subsequently arrested in Malta by the former mortgagee notwithstanding that the Jamaican court had reserved a portion of the sale fund for the satisfaction of the mortgagee's claim. The new owners had to put up security in the sum of €778,000 to release the vessel from arrest. After prolonged and contested litigation, the Maltese Court of Appeal set aside the mortgagee's arrest and recognised that the vessel had been sold free and unencumbered by the Jamaican court.

4. The *Beijing Convention*

4.1 The History of the Convention

As can be seen from the cases surveyed, the problem faced by parties is generally not that courts fail to recognise the legal effect of foreign judicial sales as conferring clean title. Indeed, in the majority of the cases referred to in this paper, the courts were at pains to vindicate the purchaser's title. The problem is, rather, that innocent purchasers are being put to the expense and time of dealing with subsequent arrests of their vessels and contesting proceedings that ought not be brought, or they are facing challenges in securing registration of their newly purchased vessels in their desired flag state.

These issues are nonetheless serious. It is imperative that clean title be able to be *enjoyed* if prospective purchasers are to pay top prices for ships sold pursuant to judicial sales. Even though it may very well be said that these problems arise in a minority of judicial ship sales, they do not arise very frequently, and they concern particular jurisdictional 'habitual offenders',[25] there is a risk that the perception of uncertainty in the security of acquiring clean title is impacting purchaser confidence. The scope for judicial discretion and national idiosyncrasies in the laws surrounding recognition of foreign judicial sales in the absence of a uniform international regime as well as the seeming lack of a formal relationship between a foreign judicial sale and a requirement for the flag state to update its ship register are considerable barriers to practical realisation of the general principle in international maritime law that a judicial sale confers clean title.[26]

[25] Myburgh (n 13) 423–4.
[26] Bleyen (n 7) 157.

These concerns prompted the development of the *Beijing Convention*. In 2007, Professor Henry Li advocated for the creation of a convention on the recognition of foreign judicial sales before the Comité Maritime Internationale ('CMI') executive committee.[27] A harmonisation instrument addressing the effects of the judicial sale procedure became part of the CMI's substantive program at the 2008 Athens Conference and remained an organisational priority from that time.[28] Efforts were made to secure the support of the International Maritime Organization ('IMO') in 2015 and 2016, and later the Hague Conference on Private International Law, although these were not successful.[29] In 2017, CMI submitted a proposal for a convention to the United Nations Commission on International Trade Law ('UNCITRAL'). UNCITRAL was receptive and proposed that a colloquium be held to better understand the case for a convention and the views of the international maritime community.

A colloquium was held in Malta in 2018 which was attended by shipowners, ship financers, charterers, ship builders, and agents as well as lawyers and judges.[30] There it was agreed that the 'lack of legal certainty in relation to the clean title which a judicial sale is intended to confer on a buyer' led to problems in the de-registration process in the country of the former flag and created obstacles in respect of the clearance of all former encumbrances and liens, which in turn created a risk of costly and lengthy proceedings thereby interrupting international trade and shipping.[31] Practitioners held the view that this was a 'serious problem'.[32] There was broad agreement that the legal lacunae could be filled by an instrument addressing recognition of the legal effects of a foreign judicial sale.[33]

UNCITRAL finalised the draft text of the Convention in mid-, and the United Nations General Assembly voted to adopt the Convention on 7 December 2022.[34] The *Beijing Convention* was opened for signature on 5 September 2023. Among its first signatories are the People's Republic of China, Liberia, Singapore and Switzerland.[35] Belgium and the European Union signed the Convention on 14 March 2024.[36] The Convention is not yet in force.

4.2 Key provisions of the Convention

The *Beijing Convention* aims to establish uniform mechanisms to ensure that the legal consequences of a judicial sale in one jurisdiction are given effect in another jurisdiction. The Convention has a limited scope. It establishes a harmonised regime for giving effect to foreign judicial sales but preserves domestic law governing the procedure of judicial sales and the circumstances in which judicial sales confer clean title.[37] The Convention regime is concerned with the *effect* of a foreign judicial sale and does not explicitly address *recognition* of the underlying judgment. For this reason, the *Beijing Convention* purposefully avoids the word 'recognition' and it does not contain any provision addressing its interaction with the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters or domestic law on the recognition of foreign judgments.[38]

Article 2 defines the key concepts of a 'judicial sale' and 'clean title' as follows:

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[27] Stuart Hetherington, *History of the Comité Maritime Internationale 1997–2022* (Comité Maritime Internationale, 2023) 47.
[28] Bleyen (n 7) 158.
[29] A Fenech, 'UN Convention on International Effects of Judicial Sale of Ships' (2022) 28(6) *Journal of International Maritime Law* 363, 363.
[30] Alexander von Ziegler, 'Proposal of the Government of Switzerland for Possible Future Work on Cross-Border Issues Related to the Judicial Sale of Ships' [2023] *European Transport Law* 205, 206.
[31] United Nations Commission on International Trade Law, Explanatory Note to the Convention (Pre-Print) 23 [11]. The pre-print of the Explanatory Note was prepared by the Secretariat of UNCITRAL for information purposes but is not an official commentary. A draft of the explanatory note (A/CN.9/1110, A C/N.9/1110/Add.1 and A/CN.9/1110/Add.2) was presented to the fifty-fifth session of UNCITRAL, which requested the Secretariat to publish the text of the explanatory note (with updates to reflect the deliberations during the session) together with the text of the Convention: *Official Records of the General Assembly, Seventy-Seventh Session, Supplement No 17* (A/77/17), para 98 ('Explanatory Note to the Convention').
[32] Stuart Hetherington, 'The Malta Colloquium on Recognition of Judicial Sale of Ships' (Colloquium Paper, Malta Colloquium, 27 February 2018) 2, 7.
[33] Explanatory Note to the Convention (n 31) 23 [11].
[34] Ibid 25 [20]; *United Nations Convention on the International Effects of Judicial Sales of Ships*, GA Res 77/100, UN Doc A/RES/77/100 (7 December 2022).
[35] 'IMO Welcomes Adoption of UN Convention on the Judicial Sale of Ships', *International Maritime Organization* (Web Page, 8 September 2023) <https://www.imo.org/en/MediaCentre/Pages/WhatsNew-1951.aspx>. See the current status of the *Beijing Convention* at 'Status: United Nations Convention on the International Effects of Judicial Sales of Ships (New York, 2022) (the "Beijing Convention on the Judicial Sale of Ships")', *United Nations Commission on International Trade Law* (Web Page) <https://uncitral.un.org/en/judicialsaleofships/status>.
[36] 'Belgium and the European Union Sign the "Beijing Convention on the Judicial Sale of Ships"', *United Nations* (Web Page, 18 March 2024) <https://unis.unvienna.org/unis/en/pressrels/2024/unisl354.html>.
[37] Explanatory Note to the Convention (n 31) 22 [3].
[38] Ibid 70 [174]. For criticism of this approach, see Shao et al (n 20) 183–4.

> **Article 2**
>
> *Definitions*
>
> (a) 'Judicial sale' of a ship means any sale of a ship:
>
> (i) Which is ordered, approved or confirmed by a court or other public authority either by way of public auction or private treaty carried out under the supervision and with the approval of a court; and
> (ii) For which the proceeds of sale are made available to the creditors;
>
> …
>
> (c) 'Clean title' means title free and clear of any mortgage or *hypothèque* and of any charge;

Article 3 addresses the Convention's scope of application:

> **Article 3**
>
> *Scope of application*
>
> 1. This Convention applies only to a judicial sale of a ship if:
>
> (a) The judicial sale is conducted in a State Party; and
> (b) The ship is physically within the territory of the State of judicial sale at the time of that sale.
>
> 2. This Convention shall not apply to warships or naval auxiliaries, or other vessels owned or operated by a State and used, immediately prior to the time of judicial sale, only on government non-commercial service.

The basic rule of the Convention established in Article 6 is that a judicial sale conducted in the jurisdiction of one state party which has the effect of conferring clean title on the purchaser has the same effect in every other state party.[39] Article 6 provides:

> **Article 6**
>
> *International effects of a judicial sale*
>
> A judicial sale for which a certificate of judicial sale referred to in article 5 has been issued shall have the effect in every in every other State Party of conferring clean title to the ship on the purchaser.

The mechanism employed by the Convention to facilitate ease of recognition of a foreign judicial sale is a certificate of judicial sale. There are several key preconditions to the issuing of a certificate which are set out in Articles 4 and 5 of the Convention.

First, notice of the sale must be given and the occurrence of the sale publicised. Article 4(2) provides that a certificate of judicial sale shall only be issued if a notice of judicial sale is given prior to the sale of the ship in accordance with the provisions of Article 4. Article 4(3) provides that the court must give notice of the judicial sale to the registry of ships with which the ship is registered; all holders of any mortgage, *hypothèque*, or registered charge; all holders of any maritime lien; the owner of the ship; any registered bareboat charterers and the bareboat charter registry. Per Article 4(4), notice must be given in accordance with the law of the State of judicial sale and contain, at a minimum, the information prescribed by Annex I to the Convention. That information includes, among other things, the name of the State of judicial sale, the court or public authority ordering the judicial sale, the name of the ship and the name of the owner. Notice of the sale must be published in the press and transmitted to the Secretary-General of the IMO, which is the current designated repository under the Convention: see Articles 4(5) and 11.

[39] Explanatory Note to the Convention (n 31) 22 [4].

Secondly, the sale must be lawful. The judicial sale must be conducted in accordance with the law of the State of judicial sale, which law must provide procedures for challenging the judicial sale prior to completion: Article 4(1)).

Thirdly, the sale must be a sale of a kind which confers clean title to the purchaser. Whether the judicial sale has conferred clean title is to be determined with reference to the law of the State of judicial sale: Article 5(1).

Article 5 sets out requirements as to the form of a certificate of judicial sale. A certificate of judicial sale is to be issued in accordance with the law and procedures of the State of judicial sale but must be 'substantially in the form' of the model contained in Annex II to the Convention and contain the information specified in Article 5(2) including, for example, a statement that the ship was sold in accordance with the requirements of the law of the State of judicial sale and of the Convention, a statement that the sale conferred clean title to the ship on the purchaser, and the name of the State, the court, or public authority which conducted the sale and the name of the ship. As with notice of the sale, the certificate of judicial sale must be transmitted to the repository referred to in Article 11 (currently the IMO) for publication. Under Article 5(5) the certificate is not conclusive evidence of title but is 'sufficient evidence of the matters' contained in it.

The production by a purchaser of a certificate of judicial sale has two important consequences. First, at the request of the purchaser, the ship registry must update its register in accordance with the certificate (Article 7). Secondly, if a certificate of judicial sale is produced then an application brought before a court to arrest a ship on the basis of a claim arising prior to the judicial sale must be dismissed (Article 8).

If there is to be a challenge to the judicial sale, Article 9 confers exclusive jurisdiction on the courts of the State of judicial sale to determine such a challenge and requires other courts to decline jurisdiction.

The basic rule of the Convention—that a judicial sale conducted in one state party which has the effect of conferring clean title on the purchaser has the same effect in every other state party—is subject to a public policy exception contained in Article 10. The ground for refusal to uphold the effects of a judicial sale is where a court determines that to give effect to the sale would be 'manifestly contrary' to public policy. This is intended to be a 'high threshold' that would be met 'only in exceptional cases'.[40]

4.3 Assessment of the *Beijing Convention*

The *Beijing Convention* is a welcome development in the law of judicial sales. The Convention's strength is its emphasis on transparency and its attention to the practicalities of a judicial sale.[41]

The requirement imposed by Article 4 for a court conducting a judicial sale to provide notice to the ship's registry and the repository, the IMO, with the latter organisation responsible for publishing an internationally accessible register of judicial ship sales, will enhance courts' efforts to bring all potentially interested persons to the table. It is also likely to put the purchaser on notice prior to the sale of any challenges that it may encounter with registration.[42] The notice requirements maximise the opportunity for creditors to participate in the distribution phase and reduce the scope for later challenges to the new purchaser's title. In the face of the Convention's prescriptive notice requirements, it will be difficult for an unannounced creditor to legitimately argue that it was not made aware of a judicial sale where the Convention's provisions have been adhered to.[43] The IMO's judicial ship sale register will likely become an important aspect of the due diligence of industry participants.

Although it has been argued that the detailed notice requirements in the Convention provide unsatisfied creditors with a 'precise target' to aim for and hence may encourage challenges to a purchaser's clean title,[44] the notice requirements imposed by the Convention are not onerous. Courts should be diligent in their compliance to mitigate

[40] Ibid 83–4 [210]–[212].
[41] Myburgh (n 13) 422.
[42] Ibid.
[43] G Theocharidis, 'Some Thoughts on the Functionality of the Beijing Convention' (2022) 28(6) *Journal of International Maritime Law* 391, 403.
[44] R Thomas, 'The United Nations Convention on the International Effects of Judicial Sales of Ships: The Beijing Convention – A Textual Analysis' (2022) 28(6) *Journal of International Maritime Law* 367, 377.

the risk of challenge to a purchaser's title,[45] but the required notifications do not represent a major departure from current practice in England and Australia.[46]

The *Beijing Convention* also results in practical advantages for purchasers. Article 7 provides a clear process for purchasers to follow that overtly links a judicial sale with the outcome that it ought to have with respect to the registration of a ship. Where the State of the ship registry and the State of the judicial sale are parties to the Convention, purchasers are unlikely to experience difficulties in registering and de-registering their vessel. The Convention also enables a purchaser to produce a certificate of judicial sale to compel the release of a vessel arrested by a previous creditor or to prevent the arrest of the vessel by a previous creditor in the first place (subject to the public policy exception).[47] These provisions would prevent a situation arising akin to that faced by the purchaser of the *Bright Star*.

Notwithstanding these positive features, there do appear to be tensions in the regime established by the *Beijing Convention* that may impact its effectiveness. The first is that the Convention is expressed to govern 'the international effects of a judicial sale of a ship that confers clean title to the purchaser' (Article 1) and the Convention's primary mechanism, the certificate of judicial sale, is expressed to be issuable 'upon completion of a judicial sale that conferred clean title to the ship'. The conferral of clean title is not treated as a constitutive element of a judicial sale.[48] The drafting contains a logical circularity because arguments in favour of non-recognition or non-enforcement of a foreign judicial sale inevitably involve a claim that the foreign judicial sale did not confer clean title.[49] Myburgh argues that the drafting will invite arguments that because clean title was not conferred, the Convention regime does not apply including the provisions of the Convention that make the question of whether clean title was conferred a matter for the courts of the State of judicial sale and this in turn may provoke disputes about the law applicable to determining the validity of the judicial sale.[50] The drafting is attributable to the fact that some legal systems allow for judicial sales that do not confer clean title on the purchaser.[51] Although acknowledging that reality in an international harmonisation instrument is an understandable choice on the part of the drafters, it is also one that has the potential to undermine the Convention's aims.

Another tension is the Convention's deliberate sidestepping of 'recognition' of foreign judicial sales. Perhaps understandably, and in light of the failure of other instruments like the *International Convention on Maritime Liens and Mortgages* to attract widespread uptake, the drafters narrowly refined the Convention's scope with a view to ensuring maximum support. The drafters were thus able to avoid national differences in regimes for recognition and enforcement of foreign judgments, but the silence of the Convention on its relationship with domestic law in this area is unfortunate because it undermines certainty. What are the permissible grounds, if any, aside from public policy to resist the enforcement of a foreign judicial sale? What of long-standing grounds to refuse enforcement of a foreign judgment at common law such as an absence of jurisdiction?

Myburgh notes that Article 3 of the Convention, which describes the judicial sales to which the Convention applies, largely reflects the first limb of the *Castrique v Imrie* test for recognition of a foreign judicial sale at English common law: the location or control of the ship at the time of the sale. But the second limb, whether the foreign court had jurisdiction and acted within that jurisdiction, is omitted. Myburgh suggests what is likely to happen in practice in a proceeding where a purchaser's title is challenged or sought to be recognised in an English common law jurisdiction which is party to the Convention is that instead of applying the four general recognition principles and the discrete two-limb *Castrique v Imrie* test, the court will apply Article 3 of the Convention—the traditional bases to refuse recognition of a foreign judicial sale will be subsumed within the public policy exception in Article 10. If Myburgh is correct, this could result in the public policy exception becoming vague and nationally disparate contrary to what the drafters intended. The lack of clarity is unlikely to be welcomed by common law practitioners familiar with the long-standing *Castrique v Imrie* test and it may jeopardise the Convention's success. The extent of this issue will likely depend on how (and how many) states choose to implement the Convention. Davies contends that the United States is unlikely to become a party.[52]

[45] Failure to comply with the notice requirements does not invalidate a judicial sale per se. The consequence of a failure according to the Convention is that a judicial certificate cannot be issued. However, where a judicial sale conferring clean title is so bound up in a judicial certificate under the Convention regime, the absence of a certificate would surely be a serious impediment to a purchaser. In substance, it has the character of a formal requirement. See Theocharidis (n 43) 403.
[46] Myburgh (n 13) 422.
[47] Theocharidis (n 43) 404–5.
[48] Myburgh (n 13) 419.
[49] Ibid.
[50] Ibid 419–20.
[51] Explanatory Note to the Convention (n 31) 28 [26].
[52] M Davies, 'Recognition of Foreign Judicial Ship Sales in the United States' (2022) 28(6) *Journal of International Maritime Law* 425.

Further uncertainty arises from the status of the certificate of judicial sale. Notwithstanding that the Convention provides that the certificate of judicial sale is only 'sufficient' and not 'conclusive' or 'prima facie' evidence of title,[53] the Convention as a whole seems to encourage treatment of the judicial certificate as an authoritative document manifesting the purchaser's clean title. However, for this to have practical effect in a State other than the State in which the vessel was judicially sold not only does the State need to be a party to the Convention, the State must also have in its domestic law some means of recognising the certificate as conferring an enforceable title. As Theocharidis puts it, 'foreign certificates cannot modify proprietary relationships recorded in public books'. How should domestic law treat the 'sufficiency' of a certificate of judicial sale? It is a shame that the Convention does not provide more guidance. But such is the nature of international diplomatic compromise. It will lie with national courts to give practical and purposive effect to the Convention, underpinned by notions of comity that have long been influential in this area.

5. Conclusion

Overall, the *Beijing Convention* is a valuable tool for addressing the problems that do arise concerning the worldwide recognition of judicial ship sales. The general principle that a judicial sale confers clean title is not always enough to overcome the practical challenges—and significant costs—incurred by purchasers in realising the fruits of their purchase. The regime established by the Convention provides purchasers with the means to facilitate their enjoyment of clean title and provides creditors with assurances that they will be notified and their registered interests taken account of in a judicial sale. The Convention will benefit all participants in maritime trade by ensuring that the prices paid for ships in judicial sales match their worth.[54]

The Convention is the culmination of more than a decade of work, contributed to by Australian experts, and it enjoys the backing of important groups: among them, the CMI,[55] BIMCO[56] and the International Association of Judges.[57] It is apparent that the industry perceives that the judicial sale of ships is an area in which global rules are required in the interests of the health of maritime trade.

Shipping is a vital part of Australian commerce. Ratifying the Convention would promote the acceptance of Australian judicial sales abroad and would reinforce to the international shipping community that Australia respects the general principle of maritime law that a judicial sale confers clean title. In our view, Australia ought to ratify the Convention.

Australia should give careful consideration to what changes may be required to its regime for the recognition and enforcement of foreign judgments that constitute a judicial sale, and to its judicial sale procedures, to enable it to implement the Convention in a way that affords clarity and certainty for practitioners. Required legislative changes to implement the *Beijing Convention* may include changes to the *Shipping Registration Act 1981* (Cth), *Shipping Registration Regulations 1981* (Cth) and the *Admiralty Rules*.

[53] Article 5(5): 'Without prejudice to Articles 9 and 10, the certificate of judicial sale shall be sufficient evidence of the matters contained therein.' For criticism, see Thomas (n 44) 378.
[54] Justice Steven Rares, 'Introduction to the UNCCA UN Day Lecture 2022' (Speech, Sydney, 26 October 2022) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20221026>.
[55] Fenech (n 29) 366.
[56] Soren Larsen, 'Statement Made by BIMCO at the Occasion of CMI's 125th Anniversary Conference' [2023] *European Transport Law* 199.
[57] Neil McKerracher, 'Judicial Support for the Beijing Convention on the International Effects of Judicial Sales of Ships' [2023] *European Transport Law* 203.