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‘Satisfactory for its own Purposes’: Private Direct Arrangements and Judicial Vessel Sales

Paul Myburgh[*]

Maritime creditors (typically mortgagee banks) frequently petition admiralty courts to bypass the normal judicial vessel sale process by approving a pre-arranged private direct sale to a preferred purchaser. This article examines the reasons for a cautious or even hostile judicial response to such arrangements, and analyses the exceptional circumstances in which courts may sanction private direct arrangements as judicial sales. The issue of recognition of the legal effects of foreign judicial sales is also discussed, with reference to both the relevant common law principles and the CMI draft Convention on Foreign Judicial Sales of Ships and their Recognition.

1 Introduction

Judicial sale of a vessel and distribution of the sale proceeds to judgment creditors represent the final chapters of any in rem admiralty proceedings.[1] In order to achieve its goals, an admiralty judicial sale process arguably has to fulfil three basic criteria.

First, it has to be appropriately publicised to ensure that all relevant interested parties come forward to stake their claims and partake in the distribution of the sale proceeds according to

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[1] On judicial sales generally, see L Bleyen, *Judicial Sales of Ships* (Springer 2016); N Meeson and J Kimbell, *Admiralty Jurisdiction and Practice* (4th edn, Informa 2011) paras 4.105-4.136.

established rules and principles of priority. Otherwise, there is a real risk that unnotified and unsatisfied creditors will attempt to rearrest the vessel to relitigate their claims, resulting in potential uncertainty, disruption or injustice.

Secondly, it has to secure the best possible price for the vessel, thereby procuring the largest possible fund for the benefit of all parties. This is crucial in admiralty proceedings in rem, where the total value of the vessel is usually insufficient to satisfy all claims brought against the ship.

Thirdly, and perhaps most importantly, the judicial sale process has to achieve finality in respect of in rem claims against the ship, thus allowing the ship to trade on without further hindrance. In order to achieve finality, the judicial sale process has to extinguish all existing claims against the ship and grant a clean title, 'free of any liens and encumbrances', to the purchaser of the ship in a judicial sale. This title must be capable of being recognised and enforced, ideally throughout the world, but at the very least in the jurisdiction in which the ship is registered, in order to allow a transfer of registered ownership to take place.

Unsurprisingly, these three elements feature prominently in the judicial sale processes of most Anglo-Common Law jurisdictions. Judicial sales are widely advertised within the international maritime community, to ensure both the best possible price and notice to all interested parties:[2]

> The placing of advertisements not only publicise the sale to a wider audience interested in bidding for the vessel to obtain the best possible bid price, but they also serve to notify the sale to all others interested in the vessel so that they can come forward and establish their maritime claims. These interested parties include other claimants that may not have issued in rem writs or filed caveats against release but have an interest in the vessel and sale.

Extensive international advertising is required because of the globalised nature of shipping. Admiralty claims 'are of numerous varieties and the claimants could be from any part of the world where the ship had sailed and therefore it may take time for claims to surface'.[3]

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2 *The Turtle Bay* [2013] 4 SLR 615, [2013] SGHC 165 [20] (Belinda Ang J).

3 *The Margo L* [1997] HKCFI 776, [1998] 1 HKC 217 [2] (William Waung J).

The judicial sale process is conducted at a measured pace to avoid a 'fire sale', and typically provides for reasonable periods between judgment, sale and the final distribution of the sale proceeds, to allow any remaining creditors to come forward.[4] Post-judgment claims brought within a reasonable period are included in the distribution of the sale proceeds.[5] In appropriate circumstances, admiralty courts will even delay the final distribution to encourage creditors who are holding out to join in the process.[6] The aim of all these steps is to ensure justice for all parties with claims against the ship and finality of litigation.[7]

On judgment, the admiralty court will normally order that the ship under arrest be appraised and sold by the relevant court official.[8] This official will arrange for an independent inspection and appraisal of the ship, usually by an experienced ship broker.[9] The official may not sell the ship below its appraised value without the court's authorisation,[10] and is indeed bound to secure the highest possible price — through a competitive auction or tender process — to thereby obtain the largest possible fund for all creditors.[11]

The effect of a judicial sale is fundamentally different from that of a private sale. In a private sale of a vessel by the shipowner or mortgagee, the proceeds of sale vest in the seller alone, and the

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4 See eg CPR 61.10 (UK); O 70, r 21(2) (Sing). In *The Dora (No 2)* [1977] 1 FC 603 [16] a 'fast-track' private sale process that allowed only one week for inspection and 24 hours in which to submit offers was described by Thurlow ACJ as 'unreasonably short and unsatisfactory'.

5 *The Eva* (1950) 84 LL L Rep 20; *The Leoborg* (No 2) [1963] 2 Lloyd's Rep 441; *The Silia* [1981] 2 Lloyd's Rep 532; *The Mandarin Container* [2007] HKCA 308, [2007] 3 HKLRD 575, [2007] 4 HKC 484.

6 See *The Cerro Colorado* [1993] 1 Lloyd's Rep 58, 62: final distribution delayed by 28 days to allow Spanish master and crew to bring their claim in rem against the ship or her proceeds.

7 *The Margo L* (n 3); *The Acrux* [1962] 1 Lloyd's Rep 405, 409.

8 Referred to in different jurisdictions variously as the Admiralty Marshal (UK, Canada, Australia, Hong Kong), Sheriff (Singapore, Malaysia, India, South Africa) or Registrar (New Zealand).

9 *The Union Gold* [2014] 1 Lloyd's Rep 53 [3]; *The Turtle Bay* (n 2) [18] (Belinda Ang J): 'The Sheriff would be assisted by professional and experienced appraisers who as court-appointed appraisers have to act faithfully and impartially'. See too the Federal Court of Australia *Marshals' Manual* paras 6.3-6.9 at http://www.fedcourt.gov.au/law-and-practice/areas-of-law/admiralty/jurisdiction/marshals_manual/chapter-6.

10 *The Halcyon the Great (No 2)* [1975] 1 Lloyd's Rep 525; *The Union Gold* [2014] 1 Lloyd's Rep 53 [3].

11 See *The Silia* [1981] 2 Lloyd's Rep 534, 535; *Armco Pacific Ltd v Juliano Lim* [1989] HKCFI 198, [1989] 2 HKC 237 [19]; *The Margo L* (n 3); *The Beluga Notification (No 2)* [2011] FCA 665 [30]; *The Turtle Bay* (n 2) [19].

purchaser acquires title cum onere, that is to say, subject to any existing liens, encumbrances and claims against the ship. By contrast, a judicial sale by the court extinguishes all existing claims against the ship, including maritime liens, and confers clean title on the purchaser.[12] The proceeds of sale remain as a fund in the custody of the court, and act as a substitute for the ship.[13] All existing creditors' claims against the ship, as well as the owner's interest in the ship, are transferred to the fund representing the ship,[14] and any late post-sale claims are brought against the fund rather than the ship.[15] The raison d'être of the judicial sale is therefore to generate a fund to protect and benefit all parties interested in the res,[16] rather than merely benefiting the seller and purchaser.

There are, of course, variations on this paradigm. One classic departure from the standard judicial sale process is that the admiralty court may at its discretion order appraisement and sale pendente lite, in other words, before judgment in rem has been given.[17] This obviously has the potential to work significant injustice to the interests of the shipowner and other parties, and has therefore been approached with caution by the courts. Judicial sale pendente lite will not be ordered 'except for good reason',[18] such as where the res is dangerous, perishable or

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12 *The Tremont* (1841) 1 W Rob 163, 166 ER 534; *The Acrux* (n 7); *The Turtle Bay* (n 2) [10]-[14].

13 *The Mandarin Container* (n 5) [136] (Reyes J): '[I]n the instance of a private sale between owners and third party purchaser, upon payment the beneficial interest in and physical possession of the vessel immediately vests in the new owner with the seller divested of all interest therein, in contrast to the 'judicial sale' wherein the vessel notionally continues to exist in the form of the fund representing the sale proceeds standing in court, a fund in which owners possess a residual interest in the (often unlikely) event of there being surplus monies after satisfaction of all proven claims as have been brought in actions against the res.'

14 *The Optima* (1905) 10 Asp MLC 147, 149; *The Acrux* (n 7) 409; *The Queen of the South* [1968] P 449, 461, 462; *The Union Gold* (n 9) [2]; *The Turtle Bay* (n 2) [15]; *The Sanko Mineral* [2015] 1 Lloyd's Rep 247 [41].

15 *The Eva* (n 5): in such cases, the writ in rem is served on the Admiralty Registrar. See *The Sanko Mineral* (n 14) [41]-[48]; CPR 61.10(2)(a) and PD 61 para 3.6(3) (UK); O 70, r 7(1)(b)(Sing). See also *The Leoborg (No 2)* (n 5); *The Silia* [1981] 2 Lloyd's LR 532; *The Acrux* (n 7) 409. For a more unusual issue as to whether claims for which alternative security has already been provided should be 'readmitted' to the fund, see *The Ruta* [2000] 1 Lloyd's Rep 359 [26]-[32].

16 *The Turtle Bay* (n 2) [15]; *The Sea Urchin* [2014] 2 SLR 646, [2014] SGHC 24 [8].

17 See generally DR Thomas, 'Admiralty Sales Pendente Lite' [1998] CJQ 409; Bleyen (n 1) 126-130; C Buss, 'Ship Mortgagees: Enforcement and Remedies' in B Soyer and A Tettenborn (eds), *Ship Building, Sale and Finance* (Informa 2016) 152-153. Sale pendente lite is typically not available in Civil Law jurisdictions, because enforceable title arising from a judgment or arbitration award is a precondition to judicial sale.

18 *The Myrto* [1977] 2 Lloyd's Rep 243, 260.

deteriorating rapidly under arrest, or where the costs of maintaining the arrest are greatly disproportionate to the value of the res.

2 Court-approved private direct sales

Another variation on the standard judicial sale process involves the arresting party (typically the mortgagee bank) attempting to 'short-circuit' the public judicial sale process by arranging a direct private sale to a preferred purchaser (often an associated company or customer) and then asking the court to approve its private arrangement as a judicial sale.[19] These court-approved private direct sale arrangements, also referred to as hybrid sales or 'fast-track' sales, are often justified by mortgagees on the basis that a private direct sale is cheaper, quicker and more efficient than the standard judicial sale process,[20] which can take months to complete.[21]

The chief commercial advantage for the mortgagee of having a direct private sale approved by the court as a judicial sale in admiralty, would seem to be that the mortgagee can thereby ensure that its preferred purchaser obtains the vessel, without either having to provide the purchaser with an indemnity that the vessel is unencumbered and free from existing debts or liabilities,[22] or exposing itself to liability for a negligent valuation of the vessel.[23] The preferred purchaser may

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[19] See eg *The Margo L* (n 3) [7]. For a general discussion of court-approved private sales, see Bleyen (n 1) 135-141; Buss (n 17) 153-156.

[20] See eg J Scerri-Diacono, 'Private, Court-Approved Sales of Vessels and Aircraft in Malta' LMCLQ 356, 358: private sales are 'bound to save on time and costs to the benefit of all the parties concerned: creditors, owners and other interested parties'; Buss (n 17) 153; D Middleburgh and J Leech, 'English courts on fast track to pleasing mortgagees', Lloyd's List, 17 April 2002. For examples of 'cost-cutting' arguments, see *The Halcyon the Great (No 2)* [1975] 1 Lloyd's Rep 525, 527; *The Sea Urchin* (n 16).

[21] See eg N Lowry, 'Pateras buys *Sea Urchin* in Singapore auction' Lloyd's List, 5 August 2014 on the aftermath of the Singapore High Court's refusal to approve a private direct sale in *The Sea Urchin*: 'An official at the Greek bank said the eight-month saga had been "a nightmare", at odds with Singapore's previous reputation as an efficient place to arrest vessels.'

[22] *The Turtle Bay* (n 2) [10], [15]. Bleyen (n 1) 135; Buss (n 17) 150: where shipowners are in serious financial difficulties, the usual warranty given by the seller will be worthless 'and mortgagees are, unsurprisingly, unwilling to give open-ended guarantees to … buyers of their defaulting borrowers' warranty'.

[23] Bleyen (n 1) 135. See also R Palmer, 'What's to be done when a vessel is swamped in a sea of debt?', Lloyd's List, 10 December 2008.

also insist on the clean title that can only be provided by judicial sale.[24] Other commercial incentives for mortgagees to advocate for a court-approved private direct sale include saving on advertising costs, the costs of physical inspection and appraisal of the vessel, and court-appointed brokers' fees, which are deducted from the sales proceeds in a standard judicial sale process.[25] The private direct sale arrangement is particularly attractive where the preferred purchaser is already a customer of the mortgagee — the mortgagee can then clip the ticket both ways by financing the purchase of the ship by its customer.[26]

Court-approved private direct sale arrangements, whilst seen as acceptable or indeed legislated for in a few jurisdictions,[27] have met with a more hostile reception from most Anglo-Common Law admiralty courts. Any attempt to negotiate the private sale of a ship once the admiralty court has commissioned its appraisement and judicial sale will be regarded as an interference in the court's procedures, and will therefore amount to contempt of court.[28] Private sale arrangements entered into prior to the commencement of the judicial sale process may also constitute contempt where they are improper, or seek to undermine the integrity of the future judicial sale process:[29]

> Although a party is clearly in contempt of court if it arranges a private sale after the court commissions the Sheriff to sell a vessel, it does not necessarily follow that this party is *never* in contempt of court if it arranges a direct sale before the court so commissions the Sheriff. Much depends on the circumstances of the case. For instance, a sale could potentially constitute contempt of court in the light of evidence that impropriety had occurred in connection with the sale to the possible detriment of in rem creditors of the arrested vessel.

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[24] Buss (n 17) 150.

[25] Buss (n 17) 153. *Den Norske Bank AS v Asset Century Ltd t/a Dairy On Co* [1990] HKCA 277, [1990] 2 HKC 181 [4].

[26] Buss (n 17) 153.

[27] Scerri-Diacono (n 20). Also see Bleyen (n 1) 139-140 for a discussion of the position in Gibraltar and Malta, both 'private sale-friendly' jurisdictions.

[28] See eg *Armco Pacific Ltd v Juliano Lim* (n 11) [20]-[22]; *The APJ Shalin* [1991] 2 Lloyd's Rep 62; *The Jarvis Brake* [1976] 2 Lloyd's Rep 320, 321; *UDL Holdings Ltd v Leung Yuet Keung* [2008] HKCFI 903, [2008] 6 HKC 127 [83].

[29] *The Turtle Bay* (n 2) [6] (Belinda Ang J).

> In my view, it made no difference to the legal enquiry that a direct sale of an arrested vessel was made expressly subject to the court's approval.

Even where mortgagees have adopted a more finessed approach in seeking the court's co-operation with their private direct sale arrangements, the judicial response has remained sceptical and cautious. In this paper I analyse the (closely inter-related) reasons for the admiralty courts' concerns regarding private direct sale arrangements in admiralty proceedings, and the exceptional circumstances in which direct private sales will be approved. I then examine a recent initiative to achieve international uniformity in this area, the Comité Maritime International's Draft International Convention on Foreign Judicial Sales of Ships and their Recognition, to evaluate whether it appropriately addresses the issue of court-approved private direct sales.

3 Best possible price

One of the arguments most frequently mounted against allowing private direct sale negotiations in admiralty, whether as a substitute for, or parallel to, a court-ordered judicial sale process, is the risk that this will result in market distortion and the sale of the vessel at an undervalue to the detriment of all parties.[30] So, for example, in *The Ruth Kayser*[31] Hill J warned that persistent rumours that the vessel, which had already been committed to judicial sale, was going to be sold privately, would discourage potential purchasers from participating in the judicial sale process:[32]

> [W]hen an order for sale had been made in that Court, and the owner chose to carry out some private negotiations of his own, he would land himself into difficulty, while anyone dealing with him would know he could not give a good title. If an owner in such circumstances got private information, his duty was to bring it to the attention of the Marshal so that

30 *The Union Gold* (n 9) [19]; *The Halcyon the Great (No 2)* (n 10) 527. But see Buss (n 17) 154 for the argument that judicial auctions tend to achieved depressed 'forced sale' prices, and that a private sale is therefore a more effective mechanism for achieving a full market price.

31 (1925) 23 Ll L Rep 95.

32 *The Ruth Kayser* (1925) 23 Ll L Rep 95, 95-96.

> everyone might benefit by it. He was not going to have private owners interfering with the orders of the Court when it gave an order that there was to be a sale. If anyone did interfere, he would have to consider whether it was contempt of Court or not. If there were any private offers, let them be brought to the notice of the Marshal. The sale must go on by the Marshal without interference.

These sentiments were echoed by Sheen J in *The APJ Shalin*:[33]

> While a ship is under arrest, that ship is in the custody of the Marshal. It is immaterial who are the owners. If the owners can find someone who is willing to purchase a ship under arrest, they can sell the ship, but it will remain under arrest. But when an order for sale by the court has been made, there cannot be a private sale because that would be open to abuse. All offers to purchase the ship must be made to the Admiralty Marshal who must realise the highest price obtainable. Private negotiations could adversely affect the market, because they could have the result that potential bids would be withheld.

Apart from discouraging or confusing would-be purchasers, judges have expressed the well-founded concern that private direct sale negotiations with a preferred purchaser are inherently anti-competitive, especially when compared with the standard judicial sale process, which provides not only the 'floor protection' of an independent appraisal, but also the incentive for potential purchasers to submit their best possible prices through an internationally publicised competitive tender or auction process.[34] In a functioning market, the competitive nature of the judicial sale process (together, of course, with the promise of clean title) should ensure that the highest tender or bid may be significantly in excess of the 'floor' appraised value: 'The sky should be the limit and that can only be achieved by the market and by an appropriate exposure of a particular ship to the market interests in that ship.'[35]

[33] [1991] 2 Lloyd's Rep 62, 67.

[34] *The Margo L* (n 3) [6]-[8].

[35] *The Margo L* (n 3) [6]. The sky will, of course, be considerably lower in a depressed shipping market. See eg M W Bockmann, 'Increase in distressed sales sees vessel values drop', Lloyd's List, 29 March 2011.

Mortgagees have sought to counter this argument by producing valuations of the vessel, usually in the form of short-form broker's desk valuations, as 'evidence' of its market value. Apart from concerns as to whether such short-form valuation certificates, which are not based on a physical inspection of the vessel, constitute sufficiently accurate, detailed or independent evidence to justify a departure from the normal competitive sale process, some judges have remained sceptical that such valuation certificates will ever necessarily represent the best possible market price that may be obtained for the ship.[36]

Courts have also expressed concerns about the relative lack of international advertising and marketing that attends a direct private sale. Cosy in-house arrangements are unlikely to produce the best possible price. The onus will be on the mortgagee to demonstrate that the ship has been aggressively advertised and marketed — a mere statement to that effect is unlikely to carry much weight with the court.[37]

4 Fairness to all parties

Admiralty courts have continually stressed the need for the judicial sale process to be fair to all parties concerned — the arresting party, other intervening creditors and the defendant shipowner. The interest of creditors in achieving the best possible price for the vessel is obvious, but it is equally important to the defendant shipowner that its ship is not sold at an undervalue, to minimise the extent of its in personam liability for claims that remain unsatisfied by the in rem enforcement process. Where the shipowner does not enter an appearance (usually due to severe financial difficulties or insolvency) and judicial sale follows on default judgment, judges will take

[36] Buss (n 17) 155 suggests that the cases in which private direct sales were rejected might have gone the other way if judges had been presented with 'fully reasoned expert valuation reports, supported by evidence of precedent sales'. But cf *The Margo L* (n 3) [7] (William Waung J): 'In my judgment, even if valuation is done in the most convincing way, it cannot persuade the Court to sanction private sale. This is because valuation and appraisement is only able to perform "the floor protection" function.'

[37] *The Turtle Bay* (n 2) [35].

into consideration that the shipowner's views and circumstances are not before the court.[38] Equally, judges have been at pains to point out that the judicial sale process is in place to protect all creditors, not just maritime lien holders and mortgagees with a higher priority over rank and file creditors, or creditors with large claims.[39]

Where mortgagees ask the court to sanction private direct sales to preferred purchasers, there is a (usually well-founded) suspicion that they are acting out of commercial self-interest rather than in the interests of all parties involved in the admiralty proceedings.[40] As Belinda Ang J bluntly put it in *The Turtle Bay*,[41] more often than not 'a court-sanctioned private sale (as was the case here), is advanced for the applicant's own purpose and benefit and is *prima facie* unfair'. This suspicion of self-interest is only reinforced where the preferred purchaser happens to be an associated company or customer of the bank.[42]

Even where the mortgagee and preferred purchaser are at arm's length, it seems reasonable to ask why the preferred purchaser should not be required to participate in a judicially administered competitive public sale process. The justifications given by advocates of private direct sales — that the judicial sale process is too expensive, takes too long, or may spook the preferred purchaser[43] — are not without merit, particularly in a depressed international shipping market, where there may be much less interest in purchasing vessels, and the highest bid or tender in any

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[38] See eg *The Turtle Bay* (n 2) [2].

[39] *The Margo L* (n 3) [5].

[40] See eg *The Beluga Notification (No 2)* (n 11) (Rares J), where the mortgagee bank was the only party to put in an appearance: 'Not only does it seek an order for sale, but it is also seeking the appointment of a shipbroker and valuer that, because it is the only party, it has had to nominate in circumstances where it also seeks to bid or participate in the sale as a prospective purchaser. These features emphasise the need for the Marshal, as the responsible officer of the Court, to be able to act independently in forming his or her own view as to whom he or she considers, after an independent investigation, to be an appropriate valuer and the best method of effecting a sale at the best price.'

[41] *The Turtle Bay* (n 2) [23]: See also *The Sea Urchin* (n 16) [7].

[42] Buss (n 17) 153. See eg *The Saga Sea* [1997] HKCFI 302 (sale to an associated company); and *The Sea Urchin* (n 16) [20] (Belinda Ang J): 'I also note that the inspiration to find a buyer prepared to carry the cargo to China started from a conversation Mr Kwek had with the representative of Swissmarine's P&I Club. Okeanos is the subsidiary of a customer of the Bank. There was no evidence and it was not the Bank's case that it had [cast] the net wider in search of more interested parties to attract the best price for the Vessel'.

[43] *The Margo L* (n 3) [9].

public competitive sale process is less likely to be higher than the appraised value of the vessel.[44] However, these arguments still do not address the concern that justice must be done, and be seen to be done, for all parties to the proceedings.[45]

Thus, even in instances where a private direct sale may have the same economic outcome as a judicial sale, a court may be unwilling to endorse such an arrangement for fear that it will blur the lines between private commercial self-interest and public judicial administration. As Thurlow ACJ said in *The Dora (No 2)*:[46]

> I am not prepared to approve the procedures followed either as being a satisfactory substitute for what might have been prescribed by the Court had an application been made, or as calculated to achieve the best price obtainable. The fact of the matter, as I view it, is that the procedure is one prescribed by the plaintiff as satisfactory for its own purposes and the proposed sale which has resulted from it is not a sale by the Court at all but a sale by the plaintiff for which it now seeks the endorsement of the Court to give the transaction the appearance of a sale by the Court. I would not, therefore, be prepared to grant the order sought even if I were satisfied that the 5.9 million price is as high as any price likely to be obtained on a sale by the Court.

5 Impartiality, independence and integrity of the court

If private direct sales organised by one creditor and given the court's imprimatur as a judicial sale are perceived as unfair to other parties, this will inevitably have a negative effect on the admiralty court's general reputation for impartiality, and will ultimately undermine confidence in the court, its jurisdiction, and its procedures. Where the court is effectively called upon to approve a private arrangement after the event, it is difficult to avoid the impression that it is acting on behalf of that particular creditor. This point was made forcefully by Teare J in *The Union Gold*:[47]

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[44] This may, of course, not necessarily follow, as appraisals in a depressed shipping market are likely to be more conservative.

[45] *The Union Gold* (n 9) [20].

[46] *The Dora (No 2)* (n 4); See also *The Nel* (1997) 140 FTR 271; *Sea-Tec Fabricators Ltd v Offshore Fishing Co* [1985] FCJ 236 [17].

[47] *The Union Gold* (n 9) [4], [20].

> The Marshal is an officer of the court whose role is essential to the administration of justice in the Admiralty Court. He acts impartially. He does not act for any of the claimants in rem or for the defendant shipowner. …
>
> The difficulty with acceding to the bank's submission is that it may give the impression that the Marshal is acting for a particular claimant in rem rather than as an officer of the court who must have regard to the interests of all claimants in rem and of the defendant shipowner. This concern is reflected in *The APJ Shalin* and in *The Halcyon the Great*. In the former Sheen J expressed the concern that private sales 'would be open to abuse' … and in the latter Brandon J said that 'it is important that the reputation of the Admiralty Court for impartiality in these matters should not be tarnished in any way' … . I have therefore concluded that, as a general principle, an order should not be made that the Marshal sell to a buyer found by the arresting party notwithstanding that the proposed price appears to be at or about the market value of the vessel.

Once it is accepted that the judicial sale process involves more than simply economic considerations — that is, the quickest possible generation of the best possible price at the lowest possible cost — and that the legitimacy and propriety of a judicial sale derives from a public administrative process that is, and is seen to be, impartial, independent and in the interests of all parties, there would seem to be considerably less room left for direct private sales in admiralty. If the judicial sale is to retain its impartial and independent character, the court has to have 'entire control over the sale process',[48] and has to prescribe the sale terms, procedures and safeguards in advance, rather than merely adopting and sanctioning a sale already arranged to suit the seller.[49]

48 *The Turtle Bay* (n 2) [17]; *The Sea Urchin* (n 16) [8].

49 *The Alarissa* (1996) 115 FTR 232 [2].

6 Clean title

The significance of impartiality and fairness in the admiralty judicial sale process goes beyond ethical concerns or niceties. It is a crucial ingredient in the admiralty courts' practical success in ensuring finality of litigation, the maximum satisfaction of maritime claims, and the continuation of uninterrupted international trade by providing the purchaser in a judicial sale with a clean title free of all existing liens, charges and other maritime claims. Commercial certainty requires confidence that a judgment in rem and subsequent judicial sale will 'wipe the slate clean' in respect of that particular vessel. The locus classicus in this regard is *The Tremont*:[50]

> [The Admiralty Court] possesses an undoubted power to decree a sale of the vessel proceeded against, unless the demand of the successful suitor be satisfied. 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.

Despite his confident invocation of the general principles of the lex maritima, Doctor Lushington was fully aware of the potentially corrosive effect of distrust of the quality of the title conferred by an admiralty court in a judicial sale. Any 'alarm in the minds of purchasers that something was necessary to confer a valid title beyond the document issued by decree of the Court' would have injurious consequences for judicial sales.[51] This line of thought was further expanded upon by Hewson J in *The Acrux*:[52]

> 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

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50 *The Tremont* (n 12). See also *The Acrux* (n 7) 409; *The Cerro Colorado* (n 6) 60; *Readhead v Admiralty Marshal, Western Australia District Registry* (1998) 87 FCR 229, 242; *The Turtle Bay* (n 2) [11]; *The Phoenix* [2014] 1 Lloyd's Rep 449 [34].

51 *The Tremont* (n 12) 165, 535.

52 *The Acrux* (n 7) 409.

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

The difficulty in the real world, of course, is that there is no 'general maritime law' of judicial sales. An admiralty court's judicial sale orders are made under, and subject to, domestic law, and as such do not have any automatic extra-territorial effect.[53] More importantly, in respect of judicial sales of foreign-owned or registered vessels,[54] the court's practical ability to confer clean title is dependent on the co-operation of the administrative authorities (and ultimately the courts) in the place of the ship's registration in deleting any existing mortgages or other registered interests in the ship and allowing deregistration or transfer of registration of the ship.[55]

Given these practical realities, courts are required to fall back on the rather more fragile and nebulous concept of comity to ensure respect and recognition of judicial sales and the clean title they confer.[56] This means that the recognising court's confidence in the integrity of the foreign

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[53] See too *Deputy Marshal, Federal Court v The Galaxias* [1989] 1 FC 375, 20 FTR 141, 1989 AMC 348 [11] (Rouleau J): 'Where a ship is sold by a judicial sale pursuant to a Court order in Canada, I do not see that any conflict of laws problem arises with respect to the sale itself, (the disposition of the proceeds is a different question). The sale of the *Galaxias* has occurred as a result of the recognition of substantive rights held by the parties before this Court, and as a judicial sale is a remedy attaching to such rights, it is governed by the laws of Canada, the *lex fori*'.

[54] See eg *The Acrux* (n 7).

[55] For an interesting example of the potential complexities that can arise in the context of deletion of ship mortgages and deregistration of ships pursuant to foreign judicial sales, see *The Phoenix* (n 50).

[56] *The Acrux* (n 7) 409; *The Cerro Colorado* (n 6) 61 (Sheen J): 'I can only express the hope that the Spanish Court will, as a matter of comity, recognise the decrees made by this Court, which endeavours to give effect to the International Arrest Convention.' On the specific meaning of comity in the context of recognition of foreign judgments, see *Adams v Cape Industries Plc* [1990] Ch 433 (CA), 552: 'Underlying it all must be some notion of comity, but this cannot be comity on an individual nation-to-nation basis, for our courts have never thought it necessary to investigate what reciprocal rights of enforcement are conceded by the foreign country, or to limit their exercise of jurisdiction to that which they would recognise in others.'

judicial sale process is critical.[57] Where there is a perception that due process has not been followed, natural justice has been breached, or that one party's interests have been elevated above the rest, it will be more tempting for courts to ignore or flout foreign judicial sale orders on the basis of a breach of public policy.[58] This consideration would seem to justify a cautious approach to allowing court-approved private direct sales in admiralty, as they constitute a deviation from the standard judicial sale procedures recognised and followed in most maritime jurisdictions.

7 Special circumstances

Although Anglo-Common Law admiralty courts have generally taken a strict approach to court-approved private direct sales, they have acknowledged (as with judicial sales pendente lite) that ordering a private direct sale may be appropriate if there are 'powerful special features' or 'special circumstances' justifying departure from the normal judicial sale process.[59] So, for example, in *The Union Gold*, Teare J was willing to sanction the private direct sale of one of the vessels under arrest, the *Union Pluto*, on the basis that it represented a very unattractive commercial proposition without any ready market, and that, without an immediate sale to a purchaser willing to take over the ship as a going concern, it would lose its long-term operating contract and therefore any remaining commercial viability:[60]

> What does distinguish *Union Pluto* from the other vessels is the circumstance that the proposed buyer has a particular reason to buy this vessel and that unless a sale takes place immediately there is a risk that that reason will disappear. That risk is illustrated by the threat

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[57] *All-Weather Investments Ltd v Sealord Charters Ltd* NZCA 24/97 9: 'The Courts have laid stress on the importance of protecting a bona fide purchaser from any challenge to the validity of a judicial sale other than where there has been fraud. A Registrar's sale confers title free of encumbrances, and the purpose of a judicial sale would be frustrated if it could not be relied upon with confidence.'

[58] See eg the cases cited below at n 82.

[59] See *The Nel (No 2)* (n 46); *The Union Gold* (n 9).

[60] *The Union Gold* (n 9) [26]. Cf *The Sea Urchin* (n 16) [35], where the preferred purchaser's offer to employ crew members was insufficient to constitute 'special circumstances' where there were no other factors requiring an urgent sale.

> to the jobs of the crew and shore-based personnel. An elderly and very small commercial vessel is unlikely to attract other buyers at a price near to that which Angel Shipping is willing to pay. These matters persuaded me that, exceptionally, it was appropriate to permit the Marshal to sell the vessel to Angel Shipping Ltd at the price of €329,000 without an appraisal by the Admiralty Marshal. Given the need for an exceptionally prompt sale of *Union Pluto* and the insistence by the court on a conventional and regular sale of the other three vessels by the Admiralty Marshal, following appraisal, advertisement and invitations to bid, there is no real risk that the court's reputation for impartiality will be tarnished by permitting the Marshal to sell *Union Pluto* to a named buyer at a named price.

A finding of 'powerful special features' or 'special circumstances' to justify a private direct sale will turn on the facts of each case. However, it appears that courts will be more willing to exercise their flexible discretion in this regard where there is no ready market for a vessel, either because of its age and condition, or because of its specialised or peculiar nature,[61] or where several attempts have already been made to sell the vessel without success.[62] There are also indications that courts will be more willing to accept a private direct sale in exceptional circumstances which are similar to those justifying a sale pendente lite, namely where there is a wasting or dangerous res that needs to be dealt with as a matter of urgency,[63] or where the costs of maintaining the res under arrest are manifestly disproportionate to its value.

The party seeking to depart from the normal judicial sale process bears the burden of proving such powerful special features or special circumstances, and will have to adduce cogent evidence

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[61] See *Offshore Interiors Inc v Worldspan Marine Inc* 2014 FC 655 [42] (uncompleted super yacht: market 'very specialized'); *Canada (Minister of Supply and Services) v Horizons Unbound Rehabilitation & Training Society* [1996] FCJ 1496, 123 FTR 127, 125 FTR 81 (elderly surplus government research vessel repurposed as a training ship for young offenders 'would be difficult to employ commercially').

[62] See eg *Offshore Interiors Inc* (n 61) [37] (convincing evidence that prior efforts to sell the vessel had not lead to higher offers); *The Essington II* 2005 FC 95 [48] (seven or eight years of advertising had not produced a purchaser); *The Kinguk* 2006 FC 1290.

[63] *The Turtle Bay* (n 2) [30]; *The Nel (No 2)* (n 46).

of their existence.[64] Any such application will be scrutinised carefully by the court,[65] with due regard to the fact that approving an application for a private direct sale will create a precedent.[66] General concerns about the state of the market for the sale and purchase of vessels, or arguments that the costs of maintaining the vessel pending judicial sale are substantial,[67] or that the mortgagee is the only creditor to have come forward,[68] or is the first creditor in the priority queue with a claim that is larger than the fund, and that it is therefore pedantic to insist on going through a judicial sale process,[69] are unlikely to meet the relatively high threshold of powerful special features or special circumstances.

8 Recognition and enforcement

As discussed above, the practical effectiveness of judicial sale orders, and the conclusiveness of the clean title that judicial sales purport to confer, will depend to a large extent on notions of comity, judicial co-operation and international confidence in the impartiality and integrity of the judicial sale process. Where a foreign court has approved and ordered a private direct sale pursuant to a judgment in rem, will other courts that disapprove of private direct sale arrangements be required to recognise and enforce such orders and their consequences?

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64 *The Turtle Bay* (n 2) [32]. See also *The Saga Sea* (n 42) [5] (William Waung J): '[T]he primary and usual order of sales must be by way of public tender and if a particular mode of sale is required, it must be justified and on evidence.'

65 *The Sea Urchin* (n 16) [10].

66 *Sea-Tec Fabricators Ltd* (n 46) [6].

67 *The Turtle Bay* (n 2) [37]. *The Dora (No 2)* (n 4) [10] (Thurlow ACJ): 'I do not think such costs would be exceptional and I am, therefore, not persuaded that there is any urgency in the situation sufficient to justify a departure from the normal practice of the Court. The vessel is big, the investment which she represents is large and the expenses and losses are large in proportion. That is all that is unusual about them.'

68 But see *Sea-Tec Fabricators Ltd* (n 46) [6] for an obiter suggestion by Walsh J that expedited sale may be acceptable where the mortgagee 'is the only creditor or when the proceeds realized from the sale will be sufficient to satisfy the claims of all other creditors'. With respect, this would seem to overlook the shipowner's interests (or those of its insolvency administrator) in obtaining the best possible price for the vessel.

69 *The Turtle Bay* (n 2) [38].

The conflict of laws issue raised by this scenario is usually one of recognition of the effects of a foreign judgment in rem rather than its direct enforcement. This is because a judicial sale purchaser bringing an action for wrongful interference with its vessel, resisting arrest of its vessel, or seeking a declaratory judgment as to its ownership of the vessel, is relying on the clean title purportedly derived from the foreign judgment in rem and judicial sale, rather than on the foreign court's judgment in rem itself. The question is therefore whether the local court will recognise the effectiveness of the foreign judgment and sale '*qua* an assignment rather than *qua* a judgment'.[70] Similarly, an application by a judicial sale purchaser for orders to deregister mortgages or amend the local ship registry in accordance with a foreign judicial sale[71] may be seen as a recognition of the incidents of the title conferred by the judicial sale, rather than a direct enforcement of a foreign judgment in rem.[72]

In *Castrique v Imrie*[73] the House of Lords had to decide whether to recognise the consequences of a French court's judicial sale of a British-registered ship, the *Ann Martin*. In his advice to the House Blackburn J stated that the nature and effect of the French proceedings and judgment was to be characterised according to French law.[74] On the crucial question as to whether the French court's judgment was in personam, and therefore binding only on the parties before the court; or in rem, and therefore conferring a clean title good against all third parties, Blackburn J adopted the analysis in *Story on the Conflict of Laws* to the effect that:[75]

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[70] Dicey, Morris and Collins, *The Conflict of Laws* (15th edn with 3rd Supplement, Sweet & Maxwell Ltd 2016) paras 14-005, 14-110. For recognition of foreign judgments in rem under the Brussels Regulation regime within the European Union, see Bleyen (n 1) 20-25.

[71] See eg *The Phoenix* (n 50) (application to amend the St Vincent and Grenadines ship register following judicial sales in North Korea and China).

[72] That said, subject to the usual complications caused by issue estoppel, a foreign judgment in rem may be enforced directly by an unsatisfied judgment creditor: see *The City of Mecca* (1879) 5 PD 28; *The Despina GK* [1983] QB 214; *Pacific Star v Bank of America National Trust and Savings Association* [1965] WAR 159.

[73] *Castrique v Imrie* (1869-70) LR 4 HL 414.

[74] *Castrique* (n 73) 427. It would seem that French law was favoured here as the lex situs rather than the lex executionis: Blackburn J (429) saw the issue of recognition of the title conferred by a foreign judgment in rem as a subset of the broader principle laid down in *Cammell v Sewell* (1860) 5 H & N 728, 157 ER 1371 that the lex situs governs the validity of dispositions of movable property.

[75] *Castrique* (n 73) 428-429.

> [T]he principle that the judgment is conclusive 'is applied to all proceedings *in rem* as to moveable property within the jurisdiction of the Court pronouncing the judgment. Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of Admiralty, whether they be causes of prize or bottomry, or salvage or forfeiture, of which such Courts have a rightful jurisdiction founded in the actual or constructive possession of the subject matter.'
>
> We may observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from *Story*. 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 the world.

Applying these two criteria to the facts, Blackburn J held that the ship was in French territorial waters at the time of its sale, and that the French court had exercised an in rem jurisdiction that was 'analogous to that of our own Admiralty courts'.[76] The French court's judgment in rem and subsequent judicial sale was therefore to be recognised as conclusive by the English courts, even though it was based on an erroneous interpretation of English law.[77] The only ground on which Blackburn J seemed willing to entertain reopening the merits of a foreign judgment in rem was fraud. Even then, he seemed doubtful as to whether the rights of a bona fide purchaser in a

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[76] *Castrique* (n 73) 430.

[77] *Castrique* (n 73) 432-433. See *The Fairway* [2009] 2 Lloyd's Rep 191 [94] referring to *Castrique v Imrie*: '[T]he adjudication is regarded by this court as conclusive against all the world, irrespective that application of either the law of the place of registry or English law might produce a different result.'

judicial sale would necessarily be affected by a judgment in rem or judicial sale procured by fraud.[78]

The approach in *Castrique v Imrie*, which has been applied in a number of subsequent cases,[79] seems to allow very little scope for an admiralty court to refuse to recognise the validity of the title conferred by a foreign court-approved private direct sale, provided that the two basic requirements set out by Blackburn J are satisfied. Unless the foreign court has ordered a private direct sale where the rules of the lex fori forbid this, or the ship was outside the territory of the foreign court when it was sold, recognition of the judicial sale and the clean title conferred by it should automatically follow. On this approach, arguments that the foreign court exercised its discretion to allow a direct private sale incorrectly, or interpreted the 'special circumstances' exception too broadly, would seem to be as irrelevant as the French tribunal's mistaken interpretation of English mortgage law in *Castrique v Imrie*.

Dicey, Morris and Collins suggest that it is, nonetheless, conceivable that recognition of the title arising from a foreign judgment in rem may be refused on the ground that it offends public policy.[80] The most obvious candidates for a public policy argument would seem to be a breach of the rules of natural justice in the judgment or sale process, or an objectionable interference in the legal interests or rights of parties in the process. The difficulty with a public policy argument based on a breach of the rules of natural justice is that Common Law jurisdictions regard service of a writ in rem on the ship as sufficient notice to found in rem admiralty jurisdiction, and allow for default judgments in rem if the shipowner chooses not to appear. It is therefore much more difficult to mount plausible natural justice arguments based on lack of notice in the admiralty context.[81] An unreasonable refusal by the court to allow an interested party to intervene in

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78 *Castrique* (n 73) 433.

79 See eg *Minna Craig Steamship Co v Chartered Mercantile Bank of India London and China* [1897] 1 QB 55; *The Acrux* (n 7) 408-409; *The Cerro Colorado* (n 6) 61; *The Phoenix* (n 50) [35]-[37].

80 Dicey, Morris and Collins (n 70) para 14-111.

81 See eg *The Phoenix* (n 50) [28]-[32], where the court rejected arguments of a breach of natural justice or fraud in a North Korean judicial sale, finding that the mortgagee had chosen not to participate in the sale process.

admiralty proceedings, or clear evidence of court collusion or bias, are more likely to provide a sound basis for arguments against recognition of foreign judicial sales on public policy grounds.

It is not easy to assess the extent and severity of the problem of non-recognition of foreign judicial sales of ships and the clean title that they confer. Courts in a few jurisdictions do seem to regard any foreign judicial sales of their registered ships as illegal or contrary to public policy,[82] but these are outliers. The drafters of the Comité Maritime International's Draft International Convention on Foreign Judicial Sales of Ships and their Recognition, to be discussed below, have highlighted a handful of reported non-recognition cases as demonstrating the need for an international instrument dealing with the issue.[83] However, given the large numbers of judicial sales of ships conducted annually worldwide, these cases must represent a minuscule proportion of total judicial sales. One is left with the impression that foreign judicial sales and the clean title that they confer are generally respected and recognised by admiralty courts on the basis of the domestic conflicts principles outlined above.

9 CMI Draft Instrument

There is currently no international instrument regulating the recognition of foreign judicial sales of ships and their consequences. In 2007 the Comité Maritime International (CMI) embarked on work on this topic.[84] After the usual slow and cumbersome information-gathering exercise and several draft iterations, the CMI adopted a final Draft International Convention on Foreign

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[82] See eg Bleyen (n 1) 154-157; *Goldfish Shipping SA v HSH Nordbank AG* 2010 377 Fed App 150, 2010 AMC 1210 (3rd Circ) (Turkey refusing to recognise US judicial sale); *Bridge Oil Ltd v Fund constituting the proceeds of the sale of the MV Mega S (formerly the MV Aksu)* [2003] ZAWCHC 24 (Turkey refusing to recognise Danish judicial sale); *Deputy Marshal, Federal Court v The Galaxias* [1989] 1 FC 375, 20 FTR 141, 1989 AMC 348 (Greece attempting to place conditions on recognition of Canadian judicial sale); *Vrac Mar Inc v Demetries Karamanlis* [1972] FC 430 (Panama refusing to recognise the effects of a Canadian judicial sale).

[83] See H H Li, 'A Brief Discussion on Judicial Sale of Ships' at http://comitemaritime.org/Uploads/Judicial%20Sales/Documents%20of%20Interest/11%20A%20Breif%20Discussion%20on%20Judicial%20Sale%20of%20Ships.pdf.

[84] The relevant documents are collected here: 'Recognition of Foreign Judicial Sales of Ships' http://comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/0,2750,15032,00.html.

Judicial Sales of Ships and their Recognition at its Hamburg conference in 2014.[85] This final Draft was subsequently submitted to the Legal Committee of the International Maritime Organisation in 2015 for its sponsorship and addition to its work programme,[86] but the Legal Committee decided in June 2016 'not to pursue the proposal at this time'.[87] This set-back — which is perhaps unsurprising, given that the draft Convention is problematic in a number of respects — means that the instrument is currently in limbo. What follows is a brief discussion of whether the draft Convention addresses the issue of court-approved private direct sales of ships and their recognition.

The draft Convention defines a 'judicial sale' as meaning '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'.[88] This definition is clearly broad enough to encompass court-approved private direct sales.[89] However, the use of the word 'appropriate' is problematic in that it may invite investigations, not only into whether any alternative sale process adopted by a foreign court was lawful under the lex executionis, but also whether it was an 'appropriate' process — which begs the question, appropriate to whom, and according to which legal system's standards? The definition of 'judicial sale' in the draft Convention would also seem to suffer from circular logic, in that conferral of clean title is treated as a constituent defining element, rather than as a legal consequence, of the judicial sale.

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[85] The text of the final Draft is available at http://comitemaritime.org/Uploads/Judicial%20Sales/Beijing%20Draft%20approved%20at%20plenary-270614.docx; and in Bleyen (n 1) 179-188. See also C Zournatzi, 'A Convention on judicial sales of ships?' (2016) 16 STL 4 1

[86] See http://www.imo.org/en/MediaCentre/MeetingSummaries/Legal/Pages/LEG-102nd-session.aspx.

[87] See http://www.imo.org/en/MediaCentre/MeetingSummaries/Legal/Pages/LEG-103rd-session.aspx; Patrick Griggs, 'IMO Legal Committee – 103rd Session' (2016) 22 JIML 237, 240.

[88] Art 1.8. Emphasis added.

[89] Although, as Bleyen (n 1) 169 points out, the 30 day mandatory minimum notice period before judicial sale provided for in Art 3.3 of the draft Convention may place obstacles in the way of both court-approved private sales and sales pendente lite.

The draft Convention more or less restates the common law approach in *Castrique v Imrie* to the effect that a foreign judicial sale will be recognised where the following two preconditions are met:[90]

> (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…

Article 7 of the draft Convention requires courts to recognise the effect of the clean title conferred by any foreign judicial sales conducted in accordance with the draft Convention provisions, and to dismiss any subsequent in rem proceedings against the ship, unless the arresting party is an 'Interested Person' (typically the previous shipowner or registered mortgagee) and can show that the ship was outside the jurisdiction when it was sold, or that the judicial sale has been subsequently revoked or suspended by the foreign court.[91]

'Recognition' is defined as meaning 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'.[92] This would seem to be an attempt to produce uniformity of results by ensuring the supremacy of the lex executionis in conferring clean title. This provision, when linked to the requirement that the ship must be present in the jurisdiction where and when it is sold, broadly equates to the existing common law private international law principle that the validity of a transfer of movable property is determined by the lex situs.[93] The question of local deregistration and deletion of mortgages in accordance with the title conferred by judicial sale is dealt with separately as an administrative

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[90] Art 4.1.

[91] Arts 8.1 and 8.2.

[92] Art 1.14.

[93] See also *The Phoenix* (n 50) [40]: 'In conclusion, a foreign judicial sale is to be recognised and given effect qua assignment/transfer of title unless it is invalid under the law of the country where the sale took place. There was no plea or evidence that such was the case in respect of either of the judicial sales at issue at the trial. The prime consideration is whether the transaction was valid under local law.'

issue under Article 6, which requires the local registrar to bring the ship's registry in line with the purchaser's certificate of judicial sale.[94]

The draft Convention attempts to exclude or minimise challenges to the validity of foreign judicial sales by providing in Article 7.3 that:

> 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.

This provision is particularly problematic in cases where the validity of a foreign judicial sale is being challenged on the basis of fraud (particularly if the suggestion is that the foreign judge or court officials were involved in the fraud or collusion, which, although hopefully rare, is presumably not out of the question), or where the complaint is that the foreign court adopted a procedure that breached the principles of natural justice or offended against public policy.

Article 7.4 further narrows down potential challenges to judicial sales by providing that only an 'Interested Person' (typically the former shipowner or registered mortgagee) may challenge the validity of a judicial sale in the courts of the country where the judicial sale took place, thereby shutting out other aggrieved creditors with maritime liens and statutory rights of action in rem. This seems fundamentally at odds with the traditional role of the admiralty court in ensuring that all parties are protected and treated fairly.

Finally, Article 7.4 provides that '[n]o 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'. This provision, which echoes Blackburn J's concerns in *Castrique v Imrie* regarding the position of a bona fide purchaser even where the judicial sale itself is tainted with fraud, gives

[94] As Bleyen (n 1) 170-171 points out, however, this is usually achieved through an application to the court rather than on an ex officio administrative basis.

effect to one of the fundamental objectives of the draft Convention, 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’. However, the last part of the provision arguably goes too far, in the sense that it would guarantee the title of any subsequent purchasers,[95] even where the previous judicial sale was tainted with fraud between the seller and the initial purchaser. It is difficult to see why the protection of clean title should attach to subsequent private sales where the fraudulent seller of the vessel (the purchaser in the fraudulent judicial sale) had no valid title in the ship to transfer.

Article 8.3 of the Draft Convention provides that:

> 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.

The relationship between Articles 8.3 and 7.3 is less than clear. If parties are not allowed to bring an action in a local court challenging the validity of a foreign judicial sale, and local courts have no jurisdiction to hear such challenges, that would seem to limit the local court’s rights to refuse to recognise the foreign judicial sale on public policy grounds to situations where the purchaser seeks a declaratory judgment as to its title, or applies to the court for an instruction to the Registrar to amend the local ship register. This distinction seems entirely artificial — if a foreign judicial sale of a vessel is manifestly contrary to public policy, it should hardly matter how the issue of its validity or recognition comes before the court. The manner in which Article 8.3 is applied in practice will ultimately depend on the local court’s interpretation of the threshold and ambit of its own public policy concerns, and it is doubtful whether the use of the ‘manifestly’

[95] It is not clear that there is even a requirement that subsequent purchasers must acquire the ship in good faith. The (again, logically circular) definition of ‘Subsequent Purchaser’ in Art 1.21 is ‘any Person to whom ownership of a Ship has been transferred through a Purchaser’.

qualifier will restrain courts that are minded to use the public policy exception in an overly liberal fashion.[96]

Finally, Article 10 provides that '[n]othing 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.' This provision, which was primarily drafted to avoid potential conflicts with existing relevant regimes such as the 1993 Maritime Liens and Mortgages Convention and the European Union recognition of judgments framework, seems to suggest that foreign judicial sales that do not meet the notice and other formal requirements of the draft Convention may, nonetheless, be recognised on the basis of comity. If that is so, it is difficult to see what difference the draft Convention ultimately makes to the common law position set out in *Castrique v Imrie* and *The Acrux*.

10 Conclusions

As we have seen, the three main arguments that have been raised in favour of restricting the availability of court-approved private direct sales of ships are that they will not necessarily secure the best possible price, may not be fair to all relevant parties, and may undermine the admiralty courts' reputation for impartiality and integrity. Of these arguments, the third is probably the most compelling. Court-approved private direct sales can undoubtedly be structured in a manner that maximises sale proceeds, but there will always be the suspicion that the arrangement was not entirely above board. This suspicion can have a corrosive effect on the market's confidence in admiralty courts, particularly where significant financial interests are at stake.[97]

The concern is that a loss of confidence in admiralty courts may encourage aggrieved parties to challenge the validity of the judicial sale and the clean title that it confers, leading to further

[96] See Bleyen (n 1) 171, who notes that '[n]o international instrument can in fact compete with a sovereign state's interpretation of the public policy concept'.

[97] See eg K Wallis, 'Disquiet over plan for private treaty sale of arrested Kien Hung ships' Lloyd's List, 16 June 2003.

disruption of international trade. A foreign court's approval or adoption of a private direct sale process that deviates from the normal judicial sale process (which, although not internationally uniform, is reasonably similar across maritime jurisdictions worldwide) may also lead local courts to refuse to recognise foreign judicial sale orders or to complete the steps required to give clean title to a purchaser in a judicial sale, such as amendments to the local ship registry.

It is important not to overstate this concern. The common law conflicts rules laid down by the House of Lords in *Castrique v Imrie* recognise the primacy of conclusiveness of foreign judgments in rem and the validity of the title conferred by judicial sale. A bona fide purchaser in a judicial sale enjoys the fullest possible protection through the conferring of a clean title, and the validity of foreign judgments in rem can only legitimately be challenged in the most extreme cases. In this regard, the draft Convention proposed by the CMI would seem to make very few meaningful improvements to these existing principles, and, with respect, would seem to be an international unification solution in search of a largely non-existent problem.

Where problems relating to recognition of foreign judicial sales do arise in practice, these seem to be caused by a handful of judges over-eagerly mounting the proverbially unruly horse of public policy.[98] It is difficult to see how these isolated problems of a lack of judicial self-restraint can be entirely eliminated. They may perhaps be reduced by public censure within the international maritime community, or by bringing indirect commercial pressure to bear on flag jurisdictions that repeatedly refuse to recognise foreign judicial sales of their ships without valid reasons.
However, even if admiralty courts' approval and adoption of direct private sale processes do not result in significant non-recognition issues or encourage title validity challenges, it still does not follow that it is appropriate for admiralty courts to allow private direct sales on a routine basis. The most fundamental policy concern remains — the integrity and legitimacy of the judicial sale process. This integrity and legitimacy derives from the court's careful and balanced exercise of its judicial oversight and control of all aspects of the sale process. Judicial sales are fundamentally different from private sales. Courts are not marketplaces for mortgagees. Any abnegation by

98 *Richardson v Mellish* (1824) 2 Bing 229, 303, 130 ER 294, 252.

admiralty courts of their responsibilities to oversee and control judicial sales thus risk the perception that they have allowed themselves to be used merely as rubber stamps[99] or chops to facilitate private bargains in an admiralty bazaar.

[99] *Canada (Minister of Supply and Services)* (n 61) [19]: 'It is not generally the Court's role to approve private sales, in effect rubber stamping what has already been done, perhaps to the detriment of the interests of other parties.'