

**Is a Ship under Construction a ‘Ship’ under the MLM Conventions,
the 1952 Arrest Convention and the Proposed Convention on
Recognition of Foreign Judicial Sales of Ships?**

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Abstract: The paper is an attempt to undertake a comprehensive inquiry into the legal status of a ship under construction for the purpose of maritime liens, arrest and judicial sale of a ship. In particular, the applicability of the corresponding maritime conventions to a ship under construction will be assessed in detail. To achieve this end, the defining feature of a ship in the above maritime contexts under domestic law is first identified and examined, then comes the registration and flag requirements in the relevant maritime conventions. It is found that although a launched yet unfinished ship may qualify as a ship for the purpose of maritime liens, arrest and judicial sale of ships in various jurisdictions, it is not governed by the MLM Conventions; it falls outside of the 1952 Arrest Convention until it is entitled to fly the flag of a State; and it is highly likely to be excluded from the future convention on recognition of foreign judicial sales of ships.

Keywords: ship under construction; judicial sale; MLM conventions; 1952 Arrest Convention; mobility; registration

Introduction

When a ship under construction should be treated as a ship is a recurring issue for maritime lawyers. With the internationalisation of the shipbuilding sector and the corresponding financial operations, it becomes increasingly difficult to solve a dispute involving a ship under construction within the borders of a State once and for all. Therefore, the first inquiry is: under what conditions, if any, a maritime convention would be applicable to the ship under construction.

And the MLM conventions,¹ the 1952 Arrest Convention² and the proposed Convention on Recognition of Foreign Judicial Sales of Ships³ are packaged for examination as they all deal with the property aspects of a ship. Maritime liens are privileged claims upon a ship in respect of certain services rendered to it and certain damages or injuries caused by it.⁴ Maritime liens are ordinarily enforced through the arrest of the ship. The ship would be released when security is provided, otherwise, it would be sold by a competent court for the enforcement of maritime claims (judicial sale).⁵ As these mechanisms are interconnected and constitute integral parts of the

¹ International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (adopted 10 April 1926, entered into force 2 June 1931) (MLM 1926); International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (adopted 27 May 1967, not yet in force) (MLM 1967); International Convention on Maritime Liens and Mortgages (adopted 6 May 1993, entered into force 5 September 2004) (MLM 1993).

² International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships (adopted 10 May 1952, entered into force 24 February 1956) (1952 Arrest Convention).

³ All the draft instruments, prepared either by the CMI International Working Group on Recognition of Foreign Judicial Sales of Ships (with the contribution of various National Maritime Law Associations), or by the UNCITRAL Working Group on Judicial Sale of Ships, will be taken into consideration.

⁴ Christopher Hill, *Maritime Law* (6th edn, Informa 2003) 119.

⁵ Although it is the practice of some jurisdictions (like Denmark, Norway, Spain and Sweden) that the sale is not conducted solely under the control of the court, it is referred to as 'judicial sale' for the sake of discussion. Besides, in the context of 'involuntary sales of ships ordered or pursued by a court exercising its maritime jurisdiction', 'judicial sale' seems to be a term more appropriated than 'forced sale'. Secretariat of The UNCITRAL Working Group VI, 'Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft' (9 February 2021) A/CN.9/WG.VI/WP.90 (UNCITRAL Third Revision), art 2(c)(i). Henry Hai Li, 'A Brief Discussion on Judicial Sales of Ships' in *CMI Yearbook 2009* (CMI 2009) 344; Francesco

enforcement of maritime claims, it would be ridiculous for an object to be considered a ship in one situation but not a ship in another.

Unfortunately, there is no definition of ‘ship’ in any international convention governing maritime liens and the arrest of ships.⁶ In the latest Draft Instrument on the Judicial Sale of Ships, instead of being defined with some substantial features, ship is defined as ‘any ship or other vessel [registered in a registry that is open to public inspection] that may be the subject of an arrest or other similar measure capable of leading to a judicial sale under the law of the State of judicial sale’.⁷ This is more a scope of application provision than a pure definition. Though the line between the two is blurred on occasion, the latter is undoubtedly more revealing in determining the extent to which a ship at the beginning of its life cycle should be covered in a particular maritime context.

Accordingly, the following points will be addressed in turn in the coming paragraphs: (1) the defining feature of a ship for the purpose of maritime liens, arrest and judicial sale; (2) the registration and flag requirements in the maritime conventions relating to maritime liens, arrest and judicial sale; and (3) implication of the above elements in determining the applicability of relevant conventions to a ship under construction.

1. Defining Feature of a Ship: in Theory and in Reality

It is submitted that theoretically, the defining feature of a ship for the purpose of maritime liens, arrest and judicial sale is that it is a negotiable and moveable asset of value.⁸ To be more specific, it is a ship’s ability to move between jurisdictions and to incur debts and liabilities repeatedly in the course of shipping, that exposes the relevant creditors to higher risks of unsatisfactory enforcement of their claims.⁹ And it is highly likely that a foreign creditor can only find security in the ship itself,¹⁰ while a tort victim of damage caused by a ship is in an even more vulnerable position.

In view of the above, maritime liens are devised to give priority to the interests which are considered worthy of special protection. Attaching to the ship from the moment that the cause of action arises, the maritime lien travels with the ship wherever it goes and

Berlingieri, ‘Synopsis of the Replies from the Maritime Law Associations of Argentina, Australia, Belgium, Brazil, Canada, China, Croatia, Denmark, Dominican Republic, France, Germany, Italy, Japan, Malta, Nigeria, Norway, Singapore, Slovenija, South Africa, Spain, Sweden, United States of America, Venezuela to the Questionnaire in respect of Recognition of Foreign Judicial Sales of Ships’ in *CMI Yearbook 2010* (CMI 2011) 268-271.

⁶ Although in the scope of application clauses, there might be a ‘sea-going’ qualification or a registration requirement for ships subject to the conventions.

⁷ UNCITRAL Third Revision, art 2(i).

⁸ Daniel Patrick O’Connell, *The International Law of the Sea*, vol 2 (Clarendon Press 1984) 748.

⁹ *Merchants Nat’l Bank v Dredge General GL Gillespie* 663 F 2d 1338 (5th Cir 1981) 1348; Edgar Gold, Aldo Chircop and Hugh Kindred, *Maritime Law* (Irwin Law 2003) 267 (as cited in Graham Walker, ‘Judicial Sale, Vessel Mortgages, Maritime Liens and Priorities’ (*Canadian Maritime Law Journal and Papers*, 23 May 2014) 7 <http://cmla.org/papers/Judicial_Sale_-_Walker.pdf> accessed 19 June 2021); Raymond P Hayden and Kipp C Leland, ‘The Uniqueness of Admiralty and Maritime Law: The Unique Nature of Maritime Liens’ (2005) 79 *Tul L Rev* 1227, 1228; Sarah Fiona Gahlen, ‘Ships Revisited: A Comparative Study’ (2014) 20 *JIML* 252, 253.

¹⁰ Thomas A Russell, ‘Personality of the Ship’ in *Benedict on Admiralty*, vol 2 (Matthew Bender & Company, Inc 2021) s 21.

whosoever hand it is transferred into, unless the debt is paid or the ship is sold by way of judicial sale.¹¹ The maritime lien keeps ‘ships moving in commerce while not allowing them to escape their debts by sailing away’,¹² so that the creditors are assured that their claims will be satisfied and they are more willing to enter into contracts with the shipowner (or the master).¹³

Similarly, the risk that a ship may sail away necessitates the arrest and/or judicial sale thereof.¹⁴ To start with, it is a craft’s practical capability to move, rather than its actual or primary use, that justifies the provisional and/or enforcement measures. For example, in *Global Marine Drilling Co v Triton Holdings Ltd*,¹⁵ a mobile off-shore drilling unit was found to be a ship for the purpose of 1952 Arrest Convention.¹⁶ Moreover, the mobility of a ship also gives rise to the common (though not universal) practice that in respect of a maritime claim for which a ship may be arrested, the courts of the country in which the arrest is made will have jurisdiction on the merits.¹⁷ As the ship is the main (and often the sole) asset of the debtor available to the creditors, it is cost-efficient to solve the dispute in the same court where physical and legal measures are taken, in other words, such a practice is justified in terms of convenience.¹⁸ Lastly, as there is a natural link between the arrest and judicial sale of a ship, a feature in the definition of ‘ship’ stands or falls in both contexts. This link is reflected in the revision of the definition of ‘ship’ in the draft instruments on the judicial sale of ships, for which an ‘arrest’ element is introduced in the latest two drafts.¹⁹ Accordingly, being a relatively high-value moveable is also the defining feature of a ship for the purpose of judicial sale.

In light of the above, it is hardly surprising that a ship under construction is

¹¹ *The Bold Buccleugh* (1851) 13 ER 884, 890-891; *The Joseph Warner* 32 F Supp 532 (D Mass 1939) 533-534; Thomas A Russell, ‘Process in Rem and Its Modern Developments’ in *Benedict on Admiralty*, vol 2 (Matthew Bender & Company, Inc 2021) s 22.

¹² *Equilease Corp v The Sampson* 793 F 2d 598 (5th Cir 1986) 602.

¹³ Italian Maritime Law Association, ‘Italian Maritime Law Association Replies’ (Hypo-5, 3-64) in CMI, *XXVIIth New York Conference* (CMI 1965) 116-117.

¹⁴ Walter P Verstrepen, ‘Arrest and Judicial Sale of Ships in Belgium’ [1995] LMCLQ 131, 131; Verónica Ruiz Abou-Nigm, *The Arrest of Ships in Private International Law* (OUP 2012) para 1.03. *Quanzhou Luojiang Sub-branch of Industrial and Commercial Bank of China, Ltd v Jincheng Shipping Co, Ltd of Quanzhou City* [Chinese] (2016) Min 72 Zhi No 29-5, Xiamen Maritime Court, 20 December 2018 (in which an unfinished ship vanished when it was about to be arrested and judicially sold).

¹⁵ 1999 SC 277 (OH) (Lord Marnoch).

¹⁶ Administration of Justice Act 1956 (UK), 1956 c 46, s 48. See also Scottish Law Commission, ‘Report on Diligence on the Dependence and Admiralty Arrestment’ (Scot Law Com No 164) (22 December 1997) para 7.189 <<https://www.scotlawcom.gov.uk/files/5512/7989/7470/rep164.pdf>> accessed 22 April 2020 (which explicitly recognized a floating oil-rig ‘capable of being towed around the seas from place to place’ as a ship for the purpose of arrest).

By contrast, under Greek law, drilling platforms are treated as immovable property for the purpose of arrest once they are fixed. *Maritime Law Handbook*, Greece pt I-7 (64th supp June 2018).

¹⁷ 1952 Arrest Convention, art 7(1); Verstrepen (n 14) 135; Francesco Berlingieri, ‘Enforcement of Maritime Claims’ in David Joseph Attard (ed), *The IMLI Manual on International Maritime Law, Volume II: Shipping Law* (OUP 2014) 530. Civil Procedure Law of the People’s Republic of China, Order No 71 [1991] of the President of the People’s Republic of China, came into effect on April 9 1991, amended for the third time on 1 July 2017, art 265; Special Maritime Procedure Law of the People’s Republic of China, Order No 28 [1999] of the President of the People’s Republic of China, came into effect on 1 July 2000 (MPL 1999), art 19.

¹⁸ Henry Hai Li, *A Study on Real Rights in Ships* [Chinese] (Law Press 2002) 239-240; Abou-Nigm (n 14) paras 1.24 and 7.107.

¹⁹ Secretariat of The UNCITRAL Working Group VI, ‘Draft Instrument on the Judicial Sale of Ships: Annotated Second Revision of the Beijing Draft’ (11 February 2020) A/CN.9/WG.VI/WP.87 (UNCITRAL Second Revision), art 2(i); UNCITRAL Third Revision, art 2(i).

considered as a ‘ship’ for the purpose of maritime liens, arrest and judicial sale from the moment of launching²⁰ in the domestic law of various jurisdictions. However, it is not thought to be an obvious truth in every municipal system.

With regard to maritime liens, it is applicable to launched yet unfinished ships in Australia,²¹ Canada,²² Chile,²³ Croatia,²⁴ Germany,²⁵ the Netherlands,²⁶ Norway,²⁷ Sweden²⁸ and the United States.²⁹ But it is not available for those ships in France and Poland.³⁰ And the main argument is that only a ship which is put to sea for a voyage can give rise to a maritime lien.³¹ With respect, this argument is flawed in two aspects. First, a maritime lien may arise when a ship is not on a ‘voyage’ in the narrow sense, but in port in preparation for a voyage.³² Likewise, it may attach to an incomplete vessel at the fitting-out berth or when it is towed within the port where the yard is located. Besides, even a ship under construction will be put to sea for a voyage when it undergoes its sea trial, if a collision or salvage occurred on the trial trip, the relevant parties should not be placed in a position inferior to that of their counterpart in relation to an existing ship.³³

Under Chinese law,³⁴ there is no statutory provisions concerning the availability of maritime liens to ships under construction. Although they have been upheld in judicial

²⁰ Admittedly, ships are launched with varying degrees of mobility. Nevertheless, since the general trend is that lots of outfitting work is finished at a workstation or shipway before launching, most ships are launched at a rather advanced stage of construction. Therefore, unless it is shown that a launched ship can only be moved with great difficulty, it is considered technically moveable for the sake of discussion.

²¹ Admiralty Act 1988 (AU) No 34, 1988, ss 3(1) and 15; Alan Polivnick, ‘Maritime Liens in Australia’ in *Benedict on Admiralty*, vol 2 (Matthew Bender & Company, Inc 2021) s 174.

²² Canada Shipping Act, 2001, SC 2001, c 26 (Canada Shipping Act), ss 2 and 86; Canada Marine Act, SC 1998, c 10, ss 2(1) and 122(1); Federal Courts Act (CA) RSC 1985, c F-7, ss 2(1) and 22(2); Marine Liability Act (CA) SC 2001, c 6, s 139.

²³ Code of Commerce (CL), arts 844 and 846; *Maritime Law Handbook*, Chile pt I-16 (26 supp Jan 2006).

²⁴ Maritime Code (HR), Text No 3142, came into force on 29 December 2004, art 252; Croatian Maritime Law Association, ‘Croatia MLA Replies to the Ship Nomenclature Questionnaire’ (*CMI Ship Nomenclature Documents*) 4 <<https://comitemaritime.org/work/ship-nomenclature>> accessed 23 April 2020.

²⁵ German Maritime Law Association, ‘Registration of Ships under Construction, Replies to the Questionnaire’ (RSC-8, 2-63) in *CMI 1963 Documentation II* (CMI 1963) (German Replies to under Construction Questionnaire) 27.

²⁶ Under Dutch law, maritime liens may attach to a ship under construction even before its launching. Dutch Civil Code, arts 8:190 and 8:211; Parl Gesch BW Boek 8 1992, 254 (no 3); Dutch Transport Law Association, ‘Netherlands MLA Replies to the Ship Nomenclature Questionnaire’ (*CMI Ship Nomenclature Documents*) 5 <<https://comitemaritime.org/work/ship-nomenclature>> accessed 23 April 2020 (Dutch Replies to Ship Nomenclature).

²⁷ *International Encyclopaedia of Laws: Transport Law*, Norway-43 (2019) (*IEL Transport Law*).

²⁸ *ibid* Sweden-59 (49th supp January 2016).

²⁹ *Jones v One Fifty Foot Gulfstar Motor Sailing Yacht* 625 F 2d 44 (5th Cir 1980) 47.

Nevertheless, so-called ships which have never been launched and incapable of being navigated on water are not ‘vessels’ subject to maritime liens. *Trident Marine Managers, Inc v The Serial No CEBRF0661586* 688 F Supp 301 (SD Tex 1987) 302. Moreover, no maritime lien shall attach to the work rendered under a shipbuilding contract or a contract for the supplies and services relating to shipbuilding. *Chase Manhattan Financial Services, Inc v McMillian* 896 F 2d 452 (10th Cir 1990); Thomas A Russell, ‘Liens for Necessaries – In General’ in *Benedict on Admiralty*, vol 2 (Matthew Bender & Company, Inc 2021) s 35.

³⁰ *IEL Transport Law*, France-43 and 44 (34th supp July 2012); *Maritime Law Handbook*, Poland pt II-35 (30th supp May 2007).

It should be noted that the French delegate is a proponent of the recognition of maritime liens and mortgages on ships under construction while drafting MLM 1967. CMI, *New York Conference* (n 13) 605.

³¹ Trib Boulogne sur Mer 21 March 1975, unrep’d, cited in RTD com 1975, 617 ff, no 8 ff (as cited in *IEL Transport Law*, France-43 and 44 (34th supp July 2012)).

³² *Letricheux & David v Dunlop & Co* (1891) 29 SLR 182, 185.

³³ CMI, *XXVIIth Stockholm Conference* (CMI 1963) 477.

³⁴ It should be noted that China is not a contracting state of either MLM 1926 or MLM 1993.

practice, it is not clear when is the earliest point of time at which such claim may arise. To be specific, in one case, a master of a ship which is always in dock and has never been tested in a sea trial is held to have a maritime lien for his claim for wages.³⁵ In another case, a crew member of a ship which has never successfully completed her sea trials is found entitled to maritime liens for his wages.³⁶ In a recent draft for the revision of the Maritime Code, it is provided that several kinds of maritime liens shall apply to a ship under construction if the relevant maritime claims arise during its sea trial.³⁷ However, there are also suggestions that maritime liens may attach to ships under construction in general, not limited to those sufficiently advanced to undergo their sea trials.³⁸ Considering that maritime liens are established to secure certain claims with a typical maritime character, it is submitted that maritime liens shall only be available to a ship under construction after it has been launched.

In the context of arrest of ships, it is also an open question when a ship under construction becomes susceptible to arrest. Some researchers venture that it is theoretically possible at the project's inception, when nothing exists except for the architect's plans and models.³⁹ Some researchers suggest that the moment of launching is a better choice, which has the merit of common sense and pragmatism, especially for the modern newbuildings, most of which would have developed a recognisable identity as ships when they become afloat.⁴⁰ This is also the practice of Australia,⁴¹ Canada,⁴² Chile,⁴³ the Netherlands,⁴⁴ Portugal,⁴⁵ Singapore,⁴⁶ and Sweden.⁴⁷ Meanwhile, there are also opinions in the academia or held by the practitioners that a ship under construction is not susceptible to arrest until its keel is laid,⁴⁸ or that it is 'capable of

³⁵ *YANG Linxing v Quanzhou Huihai Logistics Co, Ltd* [Chinese] (2016) Min 72 Min Chu No 525, Xiamen Maritime Court, 19 July 2015.

³⁶ *YAN Meinian v Zhejiang Zhoushan Xinhongzhou Marine Engineering Co, Ltd* [Chinese] (2017) Zhe 72 Min Chu No 617, Ningbo Maritime Court, 27 September 2017.

³⁷ Ministry of Transport of the People's Republic of China, 'The Draft for Soliciting Public Opinion on the Revision of the "Maritime Code of the People's Republic of China"' (5 November 2018), arts 2.19 and 2.35. The following heads of claims are entitled to maritime liens in relation to a ship undergoing sea trial: (1) payment claims made by the master, any crew member and any other member of the ship's complement for the wages, other remuneration, costs of repatriation and costs of social insurance that are due to the above parties in respect of their employment on the ship; (2) claims for damages in respect of loss of life or personal injury occurred in the operation of the ship; (3) payment claims for salvage awards; (4) claims in tort for loss of or damage to property other than the cargo, containers and passengers' effects carried on the ship, that occurred in the operation of the ship.

³⁸ Yuzhuo Si and James Zhengliang Hu (eds), *Proposed Draft for the Revision of 'the Maritime Code of the People's Republic of China': Texts, Legislations of Reference, Explanatory Notes* [Chinese] (Dalian Maritime University Press 2003) 65-66; Henry Hai Li, 'Opinions and Suggestions on the Revision of the Second Chapter, "Ship", of the "Maritime Code"' [Chinese] (*Henry & Co Law Firm*, 11 December 2018) <http://www.henrylaw.cn/page95?article_id=216> accessed 14 July 2021.

³⁹ Frank L Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge University Press 1970) 152-153.

⁴⁰ Simon Rainey, 'What Is a "Ship" under the 1952 Arrest Convention?' [2013] LMCLQ 50, 59-60.

⁴¹ Admiralty Act 1988 (AU), s 3(1), 'ship'.

⁴² Federal Courts Act (CA), ss 2(1) and 43; Canada Shipping Act, s 2.

⁴³ *Maritime Law Handbook*, Chile pt I-16 (26 supp Jan 2006).

⁴⁴ Dutch Civil Code, arts 8:1 and 8:190; *ibid* The Netherlands pt I-5 and I-6 (53rd supp Feb 2015).

⁴⁵ *ibid* Portugal pt I-9 (54th supp May 2015).

⁴⁶ *ibid* Singapore pt I-15 (May 2019).

⁴⁷ *ibid* Sweden pt I-2 (62nd supp November 2017).

⁴⁸ Maritime Code (HR), arts 5(29) and 849; *ibid* Croatia pt I-2 and I-5 (26 supp Jan 2006).

being used on the sea',⁴⁹ or even further, until the completion of the ship.⁵⁰

Under Chinese law,⁵¹ although it is undisputed that building blocks cannot be arrested as ship,⁵² it is not settled when the earliest moment is for a ship under construction to be arrested as a ship. In some cases, the courts seemed to be of the opinion that an unfinished ship can be arrested as a ship once it has been launched.⁵³ However, there are also courts which are of the position that an unlaunched ship in the stage of inspection can also be arrested as a ship,⁵⁴ or on the opposing side, that a ship under construction can only be arrested as a ship after it has successfully completed its sea trial.⁵⁵

Bearing in mind that mobility is the defining feature of a ship for the purpose of arrest, launching seems to be the most appropriate moment to subject a ship under construction to the ship arrest regime.⁵⁶

When it comes to the judicial sale of ships, there are some jurisdictions in which the relevant rules are also applicable to ships under construction, such as Germany, the Netherlands, Norway, Portugal and Sweden.⁵⁷ Under Chinese law, like the situation of

⁴⁹ John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* (Juta & Co 1999) 72, sec 2-2.5.1.

⁵⁰ *Maritime Law Handbook*, Federal Republic of Germany pt I-5 (59th supp November 2016).

⁵¹ China, except the Hong Kong SAR and Macao SAR thereof, is not a contracting state of the 1952 Arrest Convention.

⁵² *Ningbo Shengbang Shipping Co, Ltd v Xiangshan County Shipping Co, Ltd* [Chinese] (2009) Yong Hai Fa Shang Chu Zi No 300, Ningbo Maritime Court, 2 August 2009.

⁵³ *Eclipse Property Co, Ltd (Marshall Islands) v Fujian Shenglong Shipbuilding Co, Ltd (China) and Wenzhou Runyang Import and Export Trade Co, Ltd (China)* [Chinese] Xiamen Maritime Court (No 10 of the Ten Classic Cases Concerning the Arrest and Judicial Sale of Ships Adjudicated by the Maritime Courts across the Country). By contrast, another court granted the arrest of a ship under construction, which had been launched and assigned an IMO number, as a 'seaborne mobile unit' rather than a sea-going ship. *Jia X Co, Ltd v Guangdong Jiangmen XX Co, Ltd* [Chinese] (2012) Guang Hai Fa Chu Zi No 272, Guangzhou Maritime Court, 30 May 2012.

⁵⁴ *Empresa Naviera Boliviana v DSME Shandong Co, Ltd* [Chinese] (2015) Lu Zhi Fu Zi No 72, Shandong High People's Court, 14 July 2015. No reason (to the point) is given for the specific decision. See also *China Huarong Asset Management Co, Ltd Hubei Branch v Huhan Dayang Economic Technology Cooperation Co, Ltd* (2019) E Zhi Fu No 275, Hubei High People's Court, 16 October 2019 (arrestment of a ship under construction which has always been docked and incapable to leave the shipyard under its own power).

cf Shimin Yang, 'Four Issues to Be Clarified in the Arrest and Judicial Sale of Ships under Construction' [Chinese] [2014] 2 *Ship Economy & Trade* 45, 46, the author (a judge at Ningbo Maritime Court) argued that different preservation measures provided under the Civil Procedure Law, rather than the MPL 1999, should be taken based on the status of a ship under construction; if it has yet to be launched, it is subject to sealing up, otherwise, it is susceptible to arrest. Nevertheless, there is at least one case in which the court ruled that the sealing-up of an unlaunched barge was a type of 'ship preservation measure' of maritime nature, and was governed by the Interpretation of the Supreme People's Court on the Application of the 'Special Maritime Procedure Law of the People's Republic of China' and under the specific jurisdiction of the maritime courts. *Guangzhou Yushi Construction Engineering Co, Ltd v LIANG Naizheng, HUANG Rongbiao, YANG Lizhen and Guangzhou Nansha District Nansha Xianglong Ship Construction & Repair Yard* [Chinese] (2016) Yue 01 Zhi Fu No 40, Guangzhou Intermediate People's Court, 21 March 2016.

⁵⁵ Opinions of the Ningbo Maritime Court on Several Issues Concerning the Arrest and Judicial Sale of Ships, Dispatch No 14 [2019] of Ningbo Maritime Court, amended on 10 May 2019 (Ningbo Maritime Court Opinions), paras 2 and 42. cf *Zhoushan Weichai Products Sales & Service Co, Ltd v Ningbo Jiangbei Chuangyuan Ship Materials Co, Ltd* [Chinese] (2017) Zhe Min Zhong No 585, Zhangjiang High People's Court, 27 February 2018.

⁵⁶ Australian Law Reform Commission, *Civil Admiralty Jurisdiction (ALRC Report 33)* (Australian Government Publishing Service Canberra 1986) para 108 <<https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC33.pdf>> accessed 19 May 2020.

⁵⁷ Statute Concerning the Forced Sale and Forced Administration (Gesetz über die Zwangsversteigerung und die Zwangsverwaltung) (DE), arts 162, 169 and 171-1; Qiming Ding (tr), *German Code of Civil Procedure* [Chinese] (Xiamen University Press 2016) 398-401; Dutch Replies to Ship Nomenclature (n 26) 5; Anthonie W Jongbloed, 'Execution of Ships' in Marc L Hendrikse and Nick H Margetson (eds), *Aspects of Maritime Law: Claims under*

the judicial practice in respect of ship arrest, it is not settled when the earliest moment is for a ship under construction to be sold as a ship by way of a judicial sale. Divergent opinions of the courts including: judicial sale of barges that have not been launched, registered or inspected,⁵⁸ judicial sale of a ship launched yet unfinished,⁵⁹ judicial sale of a ship under construction only after it has successfully completed its sea trial.⁶⁰ It is submitted that the determination of the legal status of a ship under construction for the purpose of judicial sale should be consistent with its position for the application of maritime liens and the ship arrest regime, namely, it should be considered a ship immediately after launching.

2. Registration and Flag Requirements in the Maritime Conventions Relating to Maritime Liens, Arrest and Judicial Sale

According to its scope of application clause, MLM 1926 applies in two occasions: (1) when the vessel involved belongs to a contracting state and (2) when it is so provided by the national laws.⁶¹ Thus it is not applicable to a vessel belongs to a non-contracting state in the absence of national rules and a reciprocal framework.⁶²

When the Convention was updated by the CMI in 1964-1965, it was suggested by the International Subcommittee on Maritime Liens and Mortgages that, to expand the scope of the convention as wide as practically possible, it should be applied to vessels registered in a non-Contracting State as well,⁶³ so that the situation of the mortgagees would be improved because only a limited number of maritime liens would be recognized under the Convention and it would be more predictable to apply a unified set of rules.⁶⁴ Accordingly, MLM 1967 stipulates that it applies to sea-going vessels registered in a non-Contracting State as well.⁶⁵

Notwithstanding that MLM 1967 has never come into force, its scope of application clause was used as a blueprint in the preparation of MLM 1993.⁶⁶ With regard to the applicability of the convention being drawn up to vessels registered in a non-contracting

Bills of Lading (Kluwer Law International 2008) 371-372; Lief Bleyen, *Judicial Sales of Ships: A Comparative Study* (Springer International Publishing 2016) 74; *Maritime Law Handbook*, Norway pt II-19 (67th supp December 2018); *Maritime Law Handbook*, Portugal pt II-35 (54th supp May 2015); *Maritime Law Handbook*, Sweden pt III-3 (62nd supp Nov 2017).

⁵⁸ *Empresa* (n 54).

⁵⁹ *Yizheng Xingyi Shipping Build & Repair Co, Ltd, Re* [Chinese] (2018) E 72 Min Te No 35, Wuhan Maritime Court, 21 July 2018 (creditor's application for the registration of its right against a ship under construction which was arrested for auction); *Eclipse* (n 53). See also Wei Zhang, 'Issues Arising from the Judicial Sale of Ships and Their Solutions' [Chinese] [2015] 3 People's Judicature (Application) 95, 99.

⁶⁰ Ningbo Maritime Court Opinions, paras 2 and 42.

⁶¹ MLM 1926, art 14, para 1.

⁶² *Cigna Insurance Co of Europe SA NV v Oceanalpha Shipping Ltd*, STS 7465/2004 (CMI519), Spanish Supreme Court, Civil Branch, 18 November 2004 <<https://www.cmlcmidatabase.org/cigna-insurance-co-europe-sa-nv-v-oceanalpha-shipping-ltd>> accessed 14 July 2021.

⁶³ CMI, *New York Conference* (n 13) 163.

⁶⁴ *ibid* 607-609.

⁶⁵ MLM 1967, art 12, para 1.

⁶⁶ Francesco Berlingieri, 'Revision of the International Conventions for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (Brussels, 10th April, 1926 & 27th May, 1967) Final Report of the Chairman of the International Sub-Committee' in CMI, *XXXIIIrd Lisbon Conference, Documentation I* (CMI 1985) 92.

state, it was pointed out that given the international nature of the shipping practice, it is inevitable that a maritime convention would have an impact on the non-contracting states as well.⁶⁷ Therefore, it can be justified to apply the convention to vessels registered in a non-contracting state. Nevertheless, the expansive application of the convention should be confined to the jurisdictions of the state parties.⁶⁸ Consequently, it is provided in MLM 1993 that the Convention applies to all sea-going vessels registered in Contracting States and non-Contracting States, provided that the latter group of vessels are subject to the jurisdiction of a Contracting State.⁶⁹

In the context of arrest of ships, the flag of a vessel, rather than the registration thereof, is adopted as the connecting factor for the application of the Arrest Conventions.⁷⁰ Article 8 of the 1952 Arrest Convention provides that:

‘(1) The provisions of this Convention shall apply to any vessel flying the flag of a Contracting State in the jurisdiction of any Contracting State.

(2) A ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in article 1 or of any other claim for which the law of the Contracting State permits arrest.’⁷¹

It should be noted that the term ‘may’ in Article 8(2) means ‘shall’ in the context. During the draft of the Convention, the British delegates proposed to apply the Convention to ‘all vessels of whatever flag or whatever nationality’;⁷² otherwise, ships flying the flag of a non-Contracting State would only be arrested for a limited group of claims under English law, while ships flying the flag of a Contracting State were subject to a wider scope of maritime claims under the Convention. Although it was argued by some other delegates that the Convention should not have any effect on the ships flying the flag of a non-Contracting State,⁷³ the substance and reason of the proposal was in fact adopted and became Article 8(2) of the Convention.⁷⁴ And such an interpretation of Article 8(2) is adopted in judicial practice⁷⁵ and reaffirmed in the International Convention on Arrest of Ships, 1999.⁷⁶

However, the exact meaning of the reference to the flag of a ship, in particular, its relationship with the registration requirement, is not settled. It should be borne in mind

⁶⁷ Jiahua He (comp), *Explanatory Note on the International Convention on Maritime Liens and Mortgages 1993* [Chinese] (China Communications Press 1995) 89.

⁶⁸ *ibid* 90.

⁶⁹ MLM 1993, art 13, para 1.

⁷⁰ 1952 Arrest Convention, art 8; 1999 Arrest Convention, art 8.1.

⁷¹ 1952 Arrest Convention, art 8(1) and (2).

⁷² CMI, *The Travaux Préparatoires of the 1910 Collision Convention and of the 1952 Arrest Convention* (CMI 1997) 436-437, 439. The Dutch delegate also mentioned the issue without exploring it in depth.

⁷³ *ibid* 440.

⁷⁴ *ibid* 445.

⁷⁵ Rb Rotterdam 14 March 2012, S&S 2012, 86 <<https://www.cmlcmidatabase.org/visserijbedrijf-andries-de-vries-bv-v-kaliakra-limited-malta>> accessed 14 July 2021; *Spamat SRL v The Owners and All Persons Claiming an Interest in the MV Alimirante Storni* [2020] IECA 58 [25].

⁷⁶ International Convention on Arrest of Ships, 1999 (adopted 12 March 1999, entered into force 14 September 2011), arts 8.1 and 10.1(b).

that although registration can be imposed as the condition for a ship to fly the flag of a state, it is not always the case. In some jurisdictions, the flag may be granted to an unregistered ship in certain circumstances, and Ireland and the Netherlands, which are State Parties of the 1952 Arrest Convention, fall in this group.⁷⁷ Moreover, different jurisdictions hold different views on whether the 1952 Arrest Convention should be applied to unregistered ships. Under Swedish law, arrest of unregistered ships is governed by its domestic rules, while foreign-registered ships and Swedish-registered ships (in the latter case, when the applicant is neither a Swedish resident nor has his principal place of business in Sweden) are governed by the 1952 Arrest Convention.⁷⁸ By contrast, the position of the Irish court is that unregistered ships are susceptible to arrest under the Convention as well. In an unreported Irish decision, the issue was whether a ship exempted from registration under domestic law is a ship for the purpose of the 1952 Arrest Convention. The court held that the flag requirement in Article 8 of the Convention is to ascertain the nationality of the ship, rather than to lay down a registration obligation.⁷⁹ In view of the above, it is submitted that reference to the flag of a ship in Article 8 of the 1952 Arrest Convention should not be construed as a registration requirement of a ship,⁸⁰ and an unregistered ship is susceptible to arrest under the Convention as long as this is possible under, apart from the provisions of the Convention, the laws of its flag state and the jurisdiction in which the arrest is applied.

In the context of judicial sale of ships, the work concerning an international convention on the recognition of foreign judicial sales of ships is well under way. And there has been some discussion on whether the convention should be applied to unregistered ships. Although there was no registration requirement in the definition of ‘ship’ in the earlier drafts, it is included in the definition of ‘owner’⁸¹ and ‘state of registration’ (now removed).⁸² The necessity of such a requirement has been challenged by the experts from some jurisdictions, while recognized by others. For example, professionals from China argued for the introduction of a definition of shipowner similar to that in Article 1.3 of CLC 1992, so that the person or persons owning an unregistered

⁷⁷ *The Crownline* 270CR 23rd June 2011 (as cited in Irish Maritime Law Association, ‘Ireland MLA Replies to the Ship Nomenclature Questionnaire’ (*CMI Ship Nomenclature Documents*) 5 <<https://comitemaritime.org/work/ship-nomenclature>> accessed 23 April 2020); Dutch Commercial Code, art 311; Willem Jarigsmas and Gianluca Kreuze, ‘The Netherlands, Part II Flag and Registration of Vessels and Mortgages on Vessels’ in *Maritime Law Handbook*, The Netherlands pt II-10 (53rd supp February 2015).

⁷⁸ Jonas Rosengreni, ‘Sweden, Part I Arrest of Vessels’ in *Maritime Law Handbook*, Sweden pt I-3 (62nd supp November 2017).

⁷⁹ *The Crownline* (n 77).

⁸⁰ cf Rainey (n 40) 55; Francesco Berlingieri, *Berlingieri on Arrest of Ships, Volume I: A Commentary on the 1952 Arrest Convention* (6th edn, Informa 2016) para 3.15.

⁸¹ The registration requirement persists from the first draft to the latest. China Maritime Law Association, ‘Comments and Proposals on the First Draft Instrument on JSS by China MLA’ para 16 <<https://comitemaritime.org/wp-content/uploads/2018/05/China-MLA-Comments-on-1st-Draft-Instrument.pdf>> accessed 25 March 2020; UNCITRAL Third Revision, art 2(f).

⁸² Secretariat of The UNCITRAL Working Group VI, ‘Draft Instrument on the Judicial Sale of Ships: Annotated First Revision of the Beijing Draft’ (10 September 2019) A/CN.9/WG.VI/WP.84, art 1. The removal of the definition of ‘state of registration’ is a technical adjustment of the terminology used in the convention, and it has nothing to do with the registration requirement of a ship. UNCITRAL Working Group VI, ‘Report of Working Group VI (Judicial Sale of Ships) on the Work of Its Thirty-sixth Session’ (2 December 2019) A/CN.9/1007 (UNCITRAL Thirty-sixth Session), para 28.

ship would also be included.⁸³ The British lawyers were also of the opinion that ships which are not registered have to be taken into account in defining terms like ‘state of registration’ and in setting up rules for deregistration.⁸⁴ By contrast, the Canadian lawyers presupposed that the convention was to be applied to unregistered ships, but preferred to reserve their right to opt out.⁸⁵ The issue was raised again during the proceedings of the CMI International Sub-Committee on the Judicial Sale of Ships in September, 2013, and the CMI International Working Group, after deliberation, decided not to address unregistered ships specifically in the convention.⁸⁶

The issue of whether the convention is applicable to unregistered ships should be dealt with bearing the objectives of the convention in mind. To be specific, the judicial sale of the ship should eliminate the uncertainty of the legal effect of that sale, maximise the price realized by the sale and facilitate the registration of the ship after the sale.⁸⁷ To achieve this end, it is essential to ensure that the interested parties are properly notified prior to the judicial sale, which is a much harder task for an unregistered ship, as it is more costly and time-consuming to identify the interested parties for an unregistered ship. In fact, weighing fairness against efficiency, registered and unregistered ships are usually subject to different judicial sale procedures under domestic law,⁸⁸ which is true even when the unregistered vessel to be sold is a foreign one.⁸⁹ Therefore, to avoid the

⁸³ China Maritime Law Association (n 81) para 11; James Zhengliang Hu, ‘Comments and Amendment Proposals on the Second Working Draft of Instrument on Recognition of Foreign Judicial Sales of Ships’ in *CMI Yearbook 2013* (CMI 2013) 197-198.

⁸⁴ Andrew Robinson, ‘Concise Summary of Various Commentaries Received Relating to the 2nd Draft Instrument’ in *CMI Yearbook 2013* (CMI 2013) 135 and 139.

⁸⁵ Canadian Maritime Law Association, ‘Canadian MLA Comments on Beijing Draft’ (16 September 2013) 1-2 <<https://comitemaritime.org/wp-content/uploads/2018/05/Canadian-MLA-Comments-on-Beijing-Draft.pdf>> accessed 5 July 2020.

⁸⁶ International Sub-Committee on the Judicial Sale of Ships, ‘Report by the IWG on the Proceedings of the CMI International Sub-Committee on the Judicial Sale of Ships’ (30 September 2013) 5 <<https://comitemaritime.org/wp-content/uploads/2018/05/IWG-Report-on-ISC-Meeting-on-JSS-at-Dublin.docx>> accessed 3 July 2020.

Nevertheless, it can be argued that unregistered ships were meant to be covered by the draft instruments, as late as the Draft of 1st April 2019. However, the relevant provisions were removed in later drafts. Secretariat of The UNCITRAL Working Group VI, ‘Judicial Sale of Ships: Proposed Draft Instrument Prepared by the Comité Maritime International’ (1 April 2019) A/CN.9/WG.VI/WP.82, art 3.3(a).

⁸⁷ UNCITRAL Third Revision, recitals of the draft convention; Secretariat of The UNCITRAL Working Group VI, ‘Proposals of the Comité Maritime International (CMI) and of Switzerland for Possible Future Work on Cross-border Issues Related to the Judicial Sale of Ships’ (14 February 2019) A/CN.9/WG.VI/WP.81, 8.

⁸⁸ This is at least the practice of Germany, the Netherlands, Greece, Poland and Sweden. Jan Erik Pötschke, ‘Judicial Sale of Ships in Germany as an Example for a Civil Law Concept’ in *CMI Yearbook 2013* (CMI 2013) 146; Dutch Civil Procedure Code, arts 572, 575 and 576 (as cited in Jongbloed (n 57) 372 and 380); Greek Civil Procedure Code, arts 713, 715, 1011 and 1013 (as cited in *Maritime Law Handbook*, Greece pt I-7 (64th supp June 2018)); *Maritime Law Handbook*, Poland pt III-1 (25th supp Sep 2005); *Maritime Law Handbook*, Sweden pt III-3 (62nd supp Nov 2017).

In South Korea, the line is drawn between registrable and unregistrable ships. *Maritime Law Handbook*, South Korea pt I-4 (May 2019).

However, in China, procedural rules for the judicial sale of ships discriminate based on the gross tonnage of a ship, namely whether the ship is one of 20 tons gross tonnage or more. Therefore, an unregistered ship of 20 tons gross tonnage shall be sold pursuant to MPL 1999. Interpretation of the Supreme People’s Court on the Application of the ‘Special Maritime Procedure Law of the People’s Republic of China’, Judicial Interpretation No 3 [2003] of the Supreme People’s Court, came into effect on 1 February 2003, art 39; *Shanghai Port International Cruise Terminal Development Co, Ltd v Star Custom (Shanghai) Automobile Service Co, Ltd* [Chinese] (No 9 of the Top Ten Model Cases of Shanghai Maritime Court (2019), a case concerning the judicial sale of an unregistered yacht).

⁸⁹ For example, under Polish law, if a foreign ship is registered in a ship registry and considered a ship under *lex registrationis*, it will be recognized as a ship and subjected to the rules on execution against real estate (with

potential incompatibility of the convention with the procedural rules applicable to the unregistered ships under domestic law (e.g. the notice requirement), it is wise to exclude the unregistered ships from the scope of the convention.

At the 37th Session of the Working Group in December 2020, it is clarified that the convention is solely concerned with ships which are ‘capable of registration and of being encumbered by registrable charges or mortgages’, and any issue which may arise in relation to unregistered ships should be addressed bearing this premise and the proposed deregistration mechanism in mind.⁹⁰ As a result, an optional registration qualification is introduced in the definition of ‘ship’ in the latest draft of the convention.⁹¹

3. Applicability of the Maritime Conventions Relating to Maritime Liens, Arrest and Judicial Sale to a Ship under Construction

Although there is no definition of ship under either MLM 1926 or MLM 1993,⁹² it is not disputed that these conventions do not apply to ships under construction.⁹³ However, these ships were just inches away from being included in the MLM 1967.⁹⁴

The proposal to include ships under construction in MLM 1967 was based on the following considerations. First, since the end of the Second World War, there had been an increasing need for the financing of newbuildings. However, the protection for financiers who advanced money to build ships was less satisfactory, because national practices were quite different on issues such as the availability of mortgages and maritime liens (and types, if any, of the latter) on ships under construction, the effect of judicial sale of such a ship in a jurisdiction other than the one it was registered or built, whether these liens and/or mortgages could survive after the transfer of the ship to another register, and their priority vis-à-vis maritime liens and mortgages accrued after the completion and delivery of the ship.⁹⁵ Secondly, although there was a draft convention relating to registration of

amendments as it is provided in Articles 1015-1022 of the Civil Procedure Code). For an unregistered foreign ship, it is subject to the relevant rules governing the execution of movables. See Polish Maritime Law Association, ‘Poland MLA Replies to the Ship Nomenclature Questionnaire’ 3-5 (*CMI Ship Nomenclature Documents*) <<https://comitemaritime.org/work/ship-nomenclature>> accessed 23 April 2020. Turkish Commercial Code, Act No 6102, came into force on 13 January 2011, art 1383 (as cited in *Maritime Law Handbook*, Turkey pt I-30 (70th supp July 2019)).

⁹⁰ UNCITRAL Working Group VI, ‘Report of Working Group VI (Judicial Sale of Ships) on the Work of Its Thirty-seventh Session (Vienna, 14–18 December 2020)’ (29 December 2020) A/CN.9/1047/Rev.1, para 28.

⁹¹ UNCITRAL Third Revision, art 2(i). See also UNCITRAL Working Group VI, ‘Report of Working Group VI (Judicial Sale of Ships) on the Work of Its Thirty-eighth Session (Vienna, 19-23 April 2021)’ (7 May 2021) A/CN.9/1053, para 49.

⁹² Nevertheless, ships that are used exclusively for government non-commercial purposes are excluded from the scope of application of these conventions. MLM 1926, art 15; MLM 1993, art 13.

⁹³ Sjur Brækhus, ‘International Shipbuilding Contracts: Particularly Legal Problems in Connection with Finance and Security, Report’ in International Bar Association, *International Shipbuilding Contracts: Particularly Legal Problems in Connection with Finance and Security* (Grøndahl & Søns 1956) 20; CMI, *Stockholm Conference* (n 33) 535-536; CMI, *New York Conference* (n 13) 84-85. He (n 67) 27-28 and 36-37.

⁹⁴ International Subcommittee on Maritime Liens and Mortgages, ‘Provisional Draft Convention’ (Hypo-13, 5-64) (Oxford Draft) art 12 and ‘Antwerp Draft’ (Hypo-50, 7-65) art 12, in CMI, *New York Conference* (n 13) 175, 354-355. ‘Portofino Draft’ (Hypo-28, 1-65) art 12 in CMI, *Maritime Liens and Mortgages, Documents Hypo 1 - Hypo 50 New York* (CMI 1965) page 29 of Hypo-28, 1-65 <<https://comitemaritime.org/wp-content/uploads/2018/06/1964-MARITIME-LIENS-AND-MORTGAGES-NE-W-YORK.pdf>> accessed 18 April 2020.

⁹⁵ CMI, *New York Conference* (n 13) 78, 263 and 341-342.

rights on ships under construction, namely the Stockholm Draft,⁹⁶ unfortunately, it focused solely on the registered rights, leaving the priority between the registered rights and maritime liens to the national law of the Contracting States.⁹⁷ Moreover, the Stockholm Draft couldn't be counted on, as it was unlikely to receive a wide ratification since it required every Contracting State to establish a registration system for ships under construction.⁹⁸ Thirdly, it was argued that the respective priorities among maritime liens and mortgages on the ships under construction and on the existing ships should be dealt with in one single convention, otherwise, it could hardly be considered as complete.⁹⁹ Furthermore, if the issues were dealt with in separate conventions and some countries chose to adhere to one but not the other, it might jeopardise the interests of the lien creditors and mortgagees of ships under construction.¹⁰⁰

If the above lines of reasoning hold up, at what stage of the construction process should a newbuilding be included in the convention? The Oxford Draft covered all 'vessels which are to be or are under construction in Contracting States', as long as the mortgages thereon are only registrable in the (intended) State of construction.¹⁰¹ The choice to include both vessels yet to be constructed and vessels being constructed seems largely inspired by the Stockholm Draft of the Convention relating to Registration of Rights in respect of Vessels under Construction, as the latter provided that a right concerning a ship under construction could be registered long before it has any physical existence (when the shipbuilding contract has been executed), as long as it is in the State of Construction.¹⁰² However, the inclusion of vessels yet to be constructed in the Oxford Draft might have not been thought through, as it suggested that maritime liens could accrue when a ship had not begun to take shape. In fact, a claim arising prior to the launching of a ship can hardly be considered as 'maritime' by nature, and should not be secured by a maritime lien.¹⁰³ Consequently, a proposal to delete the words 'are (is) to be or' was adopted and reflected in the Portofino Draft, which qualified the notion 'vessels under construction' with a 'waterborne' requirement.¹⁰⁴ And these amendments were kept in the Antwerp Draft.¹⁰⁵

However, ships under construction are not covered in the final version of MLM 1967 after all. During the CMI conference held in New York in 1965, the German delegate proposed to delete Article 12, the provision relating to ships under construction, of the Antwerp Draft for two reasons. First, as there was some overlap between this article and the Stockholm Draft, there may be certain legal contradictions and / or practical obstacles

⁹⁶ 'Draft Convention Relating to Registration of Rights in respect of Ships under Construction' (RSC/Sto-17) (Stockholm Draft) arts 3 and 4 in CMI, *Stockholm Conference* (n 33) 569-573.

This draft was later revised and adopted as the International Convention relating to the Registration of Rights in respect of Vessels under Construction (adopted 27 May 1967, not yet in force).

⁹⁷ CMI, *New York Conference* (n 13) 341-342.

⁹⁸ *ibid* 263.

⁹⁹ *ibid* 254.

¹⁰⁰ *ibid* 163-164.

¹⁰¹ Oxford Draft, art 12 in *ibid* 175.

¹⁰² Stockholm Draft, arts 3 and 4 in CMI, *Stockholm Conference* (n 33) 569-571.

¹⁰³ CMI, *New York Conference* (n 13) 255.

¹⁰⁴ *ibid* 270; 'Portofino Draft', art 12 in CMI, *Documents Hypo 1 - Hypo 50 New York* (n 94) page 29 of Hypo-28, 1-65.

¹⁰⁵ 'Antwerp Draft', art 12 in CMI, *New York Conference* (n 13) 354-355.

to implement these conventions on the same subject. Second, since admiralty rights in ships under construction were not acknowledged in some jurisdictions, a convention with such a provision could hardly be adopted there.¹⁰⁶ This view was echoed by the Scandinavian delegates, who were also the protagonists of the Stockholm Draft, they advocated that maritime liens and mortgages on ships under construction should be regulated in a separate convention from the very beginning of the MLM 1967 drafting process.¹⁰⁷ Although there were attempts from other delegates to find a compromise, namely deleting article 12 while keeping the recognition of mortgages created under the Stockholm Draft alive, the proposal wasn't substantiated successfully and had to be dropped.¹⁰⁸ In the end the German proposal was passed by a vote of 16 to 6.¹⁰⁹

To sum up, the exclusion of ships under construction from the scope of MLM 1967 was a decision based more on drafting techniques than on the soundness of the proposition. The relevant article was deleted to secure the ratification of the convention by as many countries as possible. The existence of maritime liens on the waterborne newbuildings was not challenged, while the work to set up uniform rules for the transnational recognition of these rights were left for another occasion.

In the context of arrest of ships, theoretically, multiple heads of claims under the 1952 Arrest Convention may be instituted against a ship under construction, including but not limited to a claim arise out of (1) damage caused by the ship in collision, (2) loss of life or personal injury caused by the ship during navigation, (3) salvage of the ship and (4) construction of the ship.¹¹⁰ Based on the analysis of the Convention above, it could be argued that when a ship under construction is capable of moving or being moved, and is entitled to fly the flag of a State,¹¹¹ it should be considered a ship for the purpose of the Convention.¹¹² For example, in an Irish case, a pleasure craft under construction is found as a ship susceptible to arrest under the 1952 Arrest Convention.¹¹³ Similarly, under Italian law, a ship under construction may be registered on the ships register after launching,¹¹⁴ which means that it is entitled to fly the Italian flag during its sea trials,¹¹⁵ such a ship under construction should be considered a ship for the purpose of the Convention as well.¹¹⁶ However, as each State may set different conditions for granting the right to fly its flag, it is also possible that a ship under construction falls outside of the

¹⁰⁶ *ibid* 382 and 601-602.

¹⁰⁷ *ibid* 103 and 604.

¹⁰⁸ *ibid* 602-604 (Lord Justice Diplock on behalf of Great Britain).

¹⁰⁹ *ibid* 612.

¹¹⁰ 1952 Arrest Convention, art 1(1)(a), (b), (c) and (l).

¹¹¹ For example, temporary use of the flag of a State may be granted if a ship under construction needs to undertake an international voyage. Provisions of the People's Republic of China on the Conditions for Maritime Administrative Licensing, Order No 22 [2018] of the Ministry of Transport, amended on 1 December 2018, art 15.

¹¹² Rainey (n 40) 62-63. In addition, Mr Rainey is of the view that an unfinished ship ashore on a slipway but very near to a finished state can also be regarded as a ship under the 1952 Arrest Convention.

¹¹³ *The Crownline* (n 77).

¹¹⁴ Italian Navigation Code, art 244.

¹¹⁵ Italian Maritime Law Association, 'Italy MLA Replies to the Ship Nomenclature Questionnaire' (*CMI Ship Nomenclature Documents*) 5 <<https://comitemaritime.org/work/ship-nomenclature>> accessed 23 April 2020.

¹¹⁶ cf *Maritime Law Handbook*, Italy pt I-3 (69th supp June 2019) (which mentioned that a warship under construction for the Italian Navy falls outside of the Convention (see also Italian Navigation Code, art 645), because it is not entitled to fly the national flag before it is delivered to the Navy).

Convention until it is completed, eligible for registration and flying the flag of the specific jurisdiction.¹¹⁷

The flag requirement aside, it is submitted that launching is still the most appropriate moment to subject a ship under construction to the 1952 Convention. Nevertheless, it does not necessarily mean that every claim arising before the launching of a ship is non-maritime in nature. The most obvious example is a claim in respect of the construction of a ship, which is recognised as a head of maritime claim under both the 1952 Arrest Convention and the legislations of many states.¹¹⁸ This head of claim at least includes claims for debts due for construction, for unpaid costs of construction and for damages arising from defective construction.¹¹⁹ As the construction of a ship is a continuous process, it is neither reasonable nor practical to create a division between the claims arise before the launching and those arise thereafter.

The occasion for the judicial sale of a ship under construction does not often arise, but it should not be overlooked. Unlike the existing ships, for which it is widely accepted that the re-registration of a ship is conditioned upon the deregistration thereof from its former state of registration, deregistration of a ship under construction is not on the checklist of the future state of registration if it is impossible to register a ship under construction there in the first place. And it provides a window for the shipowner to keep both registrations alive in different jurisdictions, to the detriment of those who advance money before and after the completion of the ship.¹²⁰ Therefore, the inclusion of ships under construction in a convention on the recognition of foreign judicial sales of ships would reduce the risks involved in the enforcement of security interests either during the construction of the ship or after its delivery.

In the preparation of the draft instruments on the judicial sale of ships, the Chinese professionals were strong proponents of the view that ships under construction, when they become technically movable, should be recognized as objects of judicial sale by the contemplated convention if this is allowed under the law of the state of judicial sale.¹²¹ This view has been noted by the UNCITRAL Working Group on Judicial Sale of Ships, although no clear messages has been sent by the latter.¹²² In the latest draft, ‘ship’ is defined as ‘any ship or other vessel [registered in a registry that is open to public

¹¹⁷ Apart from the situation of making an international voyage for delivery, another situation to grant a provisional certificate of nationality is to ensure that the ship can engage in its expected duties immediately after its delivery. Beiping Chu, ‘The Necessity to Introduce the Concept of “Bill of Sale” into China’s Ship Registry Law’ [Chinese] (2014) 36(1) *Modern Law Science* 146, 150.

¹¹⁸ 1952 Arrest Convention, art 1(1)(1); MPL 1999, art 21(13). Francesco Berlingieri, *Berlingieri on Arrest of Ships, Volume I* (n 80) paras 5.210, 5.215-5.226; *Jiangsu Runyang Shipyard v YU Jihua and JIANG Ziyu* [Chinese] (2018) E 72 Min Chu No 834, Wuhan Maritime Court, 15 August 2018.

¹¹⁹ Damien J Cremean, *Admiralty Jurisdiction, Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (3rd edn, The Federation Press 2008) 97; *Lloyd’s Ship Holdings Pty Ltd v The Ship ‘Isis II’* unreported Supreme Court of Queensland, 7 September 1989 (as cited in W J Bardoel, ‘Grounds for Arrest – the “Construction of Ship” Power’ (1990) 7 *MLAANZ Journal* 57, 59); *The Flanders Harmony* (AJ Dendermonde, 20 September 1992) [1993] ETL 561 (as cited in Verstrepen (n 14) 146). In a Scottish case, even a claim for the repayment of allegedly misappropriated funds invested in the construction of a ship justified the arrestment of a ship, see *William Batey (Exports) Ltd v Kent* 1987 SLT 557.

¹²⁰ *Yueqing Sub-branch of Agricultural Bank of China Limited v Dongfang Shipbuilding Group Co, Ltd* [Chinese] (2012) Yong Hai Fa Wen Shang Chu Zi No 124, Ningbo Maritime Court, 18 November 2013.

¹²¹ China Maritime Law Association (n 81) para 16; Hu (n 83) 198.

¹²² UNCITRAL Thirty-sixth Session, para 29.

inspection] that may be the subject of an arrest or other similar measure capable of leading to a judicial sale under the law of the State of judicial sale'.¹²³

Theoretically, as long as a ship under construction can be the subject of an arrest or other similar measure which leads to a judicial sale (and is registered, should the optional qualification be ultimately adopted), it falls within the scope of the contemplated convention. Nevertheless, it is submitted that the following concern needs to be addressed before jumping to that conclusion: the gap between the registration regimes governing ships under construction and completed ships, peculiarities of ships under construction, and their implications on the recognition of the foreign judicial sale of ships.

For a completed ship, its registration is often referred to as the 'permanent registration', which is composed of both the administrative registration and the property registration and has a relatively consistent starting point across the jurisdictions. By contrast, for a ship under construction, there is no need to obtain a certificate of nationality most of the time, its registration, if it is available at all, usually confines to the property registration, which is driven by the financing banks' need to secure their advances and the buyer's need to protect itself, by clarifying who owns the newbuilding under construction, against the yard's creditors in case of the yard's bankruptcy.¹²⁴ Consequently, it may start at one of the various stages in the construction process as the legislators consider appropriate, ranging from the date on which the contract comes into effect to the date on which the ship is launched or is 50% completed.

Accordingly, first, if the administrative aspect is understood to be the focus of the registration requirement under the draft instruments,¹²⁵ a ship under construction would be by and large excluded from the draft instruments.

Secondly, in many jurisdictions, ship registration is mandatory for the completed ships, at least for those of certain types, beyond certain size or operated in certain area. By contrast, for ships under construction, the property registration thereof is not mandatory in most jurisdictions,¹²⁶ it is even impossible in some common law jurisdictions.¹²⁷ If a ship under construction is to be sold by way of a judicial sale from or

¹²³ UNCITRAL Third Revision, art 2(i).

¹²⁴ Thor Falkanger, Hans Jacob Bull and Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective* (2nd edn, Universitetsforlaget 2004) 69; *Maritime Law Handbook*, Norway pt II-17 (67th supp December 2018).

¹²⁵ 'Proposal to Add a New Output to Develop a New Instrument on Foreign Judicial Sales of Ships and Their Recognition, Submitted by China, the Republic of Korea and the Comité Maritime International (CMI)' (5 April 2016) LEG 103/13, para 3.8.

¹²⁶ There are a few exceptions in this regard, for example, Croatia (when the owner is a Croatian whose place of residence is also in Croatia), France and Italy. Maritime Code (HR), art 189(1); Transport Code (FR), Ordonnance n° 2010-1307 du 28 octobre 2010 relative à la partie législative du Code des transports, art L5114-2; *Maritime Law Handbook*, France pt II-14 (60th supp July 2017); Code of Navigation (IT), art 233.

¹²⁷ For example, it is not available in Australia, Singapore, United Kingdom and United States. Proshanto K Mukherjee and Mark Brownrigg, *Farthing on International Shipping* (Springer 2013) 215; Shipping Registration Act 1981 (AU), s 3(1); *Maritime Law Handbook*, Australia pt II-3 and 22 (41st supp April 2012); Ship Registration Act 1992 (NZ), ss 2(1) and 14(3); *Maritime Law Handbook*, Singapore pt II-32 (70th supp July 2019); David Osborne, Graeme Bowtle and Charles Buss, *The Law of Ship Mortgages* (2nd edn, Informa 2016) para 3.10; Christine F Reidy and Mark A Lowe, 'USA' in *Getting the Deal Through: Shipbuilding* (Globe Business Publishing Limited 2019).

However, in Canada, if a vessel is about to be built within its territory, it can be temporarily recorded in the register. Canada Shipping Act, s 49.

to a State Party where the ship registration system is not available to ships under construction, the following duties cannot be fulfilled as it is expected in the contemplated convention: (i) notice of the judicial sale to the registrar of the registry of ships,¹²⁸ (ii) identification of the ‘registry of ships or equivalent registry in which the ship is registered’ in the certificate of judicial sale,¹²⁹ (iii) issuance of the certificate of deregistration,¹³⁰ and /or (iv) registration of the ship under construction in the name of the purchaser or subsequent purchaser.¹³¹ And these loopholes in the judicial sale regime will cause great uncertainty for the prospective purchaser regarding the international recognition of the sale, which, in turn, may have an adverse effect upon the price realized by the sale to the detriment of interested parties.¹³²

Thirdly, even if ships under construction are amenable to property registration in both the jurisdiction of construction (which is likely to be the jurisdiction of judicial sale as well) and the jurisdiction of new registration, they may differ on when such a registration is permissible. And a judicial sale of a ship under construction involving such two jurisdictions will encounter the same issue presented in the preceding paragraph.

Fourthly, unlike the case of completed ships, in many jurisdictions, unfinished ships are only allowed to be registered in the jurisdiction where the construction is taking place.¹³³ Accordingly, unless the ship under construction is, after the judicial sale, physically transferred to a shipyard in the to-be-registered jurisdiction and finished there, it is practically impossible to re-register the ship under construction in many jurisdictions.

Lastly, issues associated with the identification of a ship in its premature form should be taken into account. To be specific, although the IMO number is obtainable upon keel laying,¹³⁴ which poses no further obstacle to the ship under construction; no real identification can be secured until the vessel is ready for measurement,¹³⁵ namely

¹²⁸ UNCITRAL Third Revision, art 4.1(a).

¹²⁹ *ibid* art 5.2(d).

¹³⁰ *ibid* art 7.1(b).

¹³¹ *ibid* art 7.1(c).

¹³² *ibid* recital 2.

¹³³ For example, this is the case of Brazil, France, Greece, Italy, the Netherlands, Norway and Sweden. *Maritime Law Handbook*, Brazil pt II-23 (70th supp July 2019); Transport Code (FR), art L5114-2; *Maritime Law Handbook*, France pt II-13 (60th supp July 2017); Code of Private Maritime Law (GR), Law 3816/1958, arts 2(1) and art 4; *Maritime Law Handbook*, Italy pt II-7 and II-15 (52nd supp December 2014); Dutch Civil Code, art 8:194(1); S&S 2011, 122, confirmed by HR (Dutch Supreme Court) 28 February 2014, S&S 2015, 29 (as cited in Dutch Replies to Ship Nomenclature (n26) 13); *Maritime Law Handbook*, Norway pt II-19 (67th supp December 2018); Maritime Code (SE), MC 1994:1009, s 2, para 3; *Maritime Law Handbook*, Sweden pt II-12 (62nd supp November 2017).

Nevertheless, since there are also prospective shipowners seeking international registries for ships under construction, open registries are on the rise in this regard as well. For example, Liberia, Marshall Islands and Panama allow for the registration of an unfinished ship which is being built in another jurisdiction. *Maritime Law Handbook*, Liberia pt II-15 (Certificate of Intended Registry) (51st supp October 2014); Republic of the Marshall Islands Maritime Act, MI 1990-107, Rev Oct/2016, s 203(f); *Maritime Law Handbook*, Panama pt II-21 (68th supp March 2019); Mukherjee and Brownrigg (n 127) 215-216.

¹³⁴ ‘IMO Identification Number Schemes’ (IMO) <<http://www.imo.org/en/OurWork/MSAS/Pages/IMO-identification-number-scheme.aspx>> accessed 6 July 2020.

¹³⁵ Sjur Brækhus and Per Brunsvig, ‘Registration of Ships under Construction, Report’ (RSC-15, 4-63) in *CMI 1963 Documentation III* (CMI 1963) 36.

when the sides, decks and partitions of the ship have been incorporated. Moreover, the component parts of and materials for the ship need to be properly identified as well to avoid fraud.¹³⁶

As a side note, in the latest draft of the convention, the registrar which has the obligation to update the ship's registration status is referred to as 'the registry of ships or equivalent registry in which the ship is registered',¹³⁷ and it is understood that an 'equivalent registry' can be one specialized in the registration of smaller vessels.¹³⁸ Since ships under construction are usually registered in a separate registry, it should at least be reflected in the text or accompanying notes of the future draft(s) of the contemplated convention.

To sum up, although it is theoretically possible to apply the contemplated convention to ships under construction, due to the existence of the gap between the registration regimes governing ships under construction and completed ships, peculiarities of ships under construction, and their implications on the recognition of the foreign judicial sale of ships, such an inclusion may impede a wide ratification of the convention. To avoid repeating the experience of MLM 1967, the proposal to include ships under construction in the future convention may be dropped from further discussions.

Conclusion

From the above discussion, it is evident that a ship for the purpose of maritime liens, arrest and judicial sale under domestic law is not necessarily a ship within the meaning of the relevant maritime conventions. Although a ship's feature of being a relatively high-value moveable also serves as a silent requirement for the application of the conventions, an additional requirement of registration (the MLM conventions and the draft instruments on the judicial sale of ships) or flag of the ship (the 1952 Arrest Convention) is imposed (or proposed). Consequently, while a launched yet unfinished ship may qualify as a ship for the purpose of maritime liens, arrest and judicial sale of ships in various jurisdictions, it is not governed by the MLM Conventions, falls outside of the 1952 Arrest Convention until it is entitled to fly the flag of a State, and is highly likely to be excluded from the future convention on recognition of foreign judicial sales of ships.

Preparation of maritime conventions is perhaps an art of regret. From the perspective of the interested parties of a shipbuilding project, none of the conventions analysed above has offered a one-stop solution which eliminates the risks involved in the enforcement of registered securities arising from the financial operations in the process of shipbuilding. From the perspective of the other interested parties of the shipping sector, the International Convention relating to the Registration of Rights in respect of Vessels under Construction (1967) is doomed to be shelved due to its unreasonably narrow scope of application and the lack of basic consensus on the principles applicable to the registration

¹³⁶ Brækhus (n 93) 13-14; German Replies to under Construction Questionnaire, 25.

¹³⁷ UNCITRAL Third Revision, art 4.1(a).

¹³⁸ UNCITRAL Second Revision, fn 8; UNCITRAL Thirty-sixth Session, para 22.

of ships under construction. Nevertheless, this is how the law evolved, and there will come a day for the unification of rules concerning the enforcement of maritime claims against a ship under construction.