



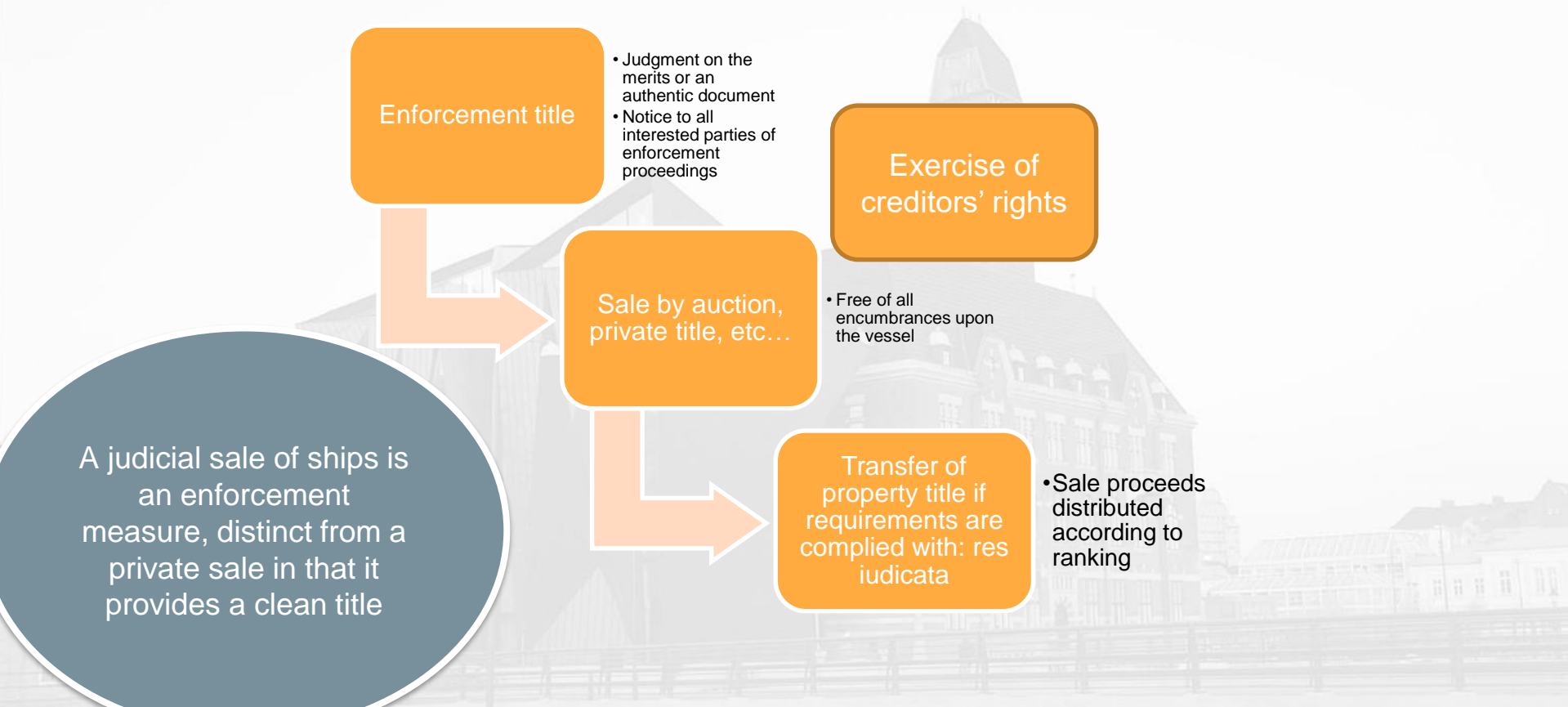
# **Interaction of the Beijing Draft with other instruments**

**Colloquium on Judicial Sale of Ships - Dubrovnik  
7 September 2020**

# Overview

- Characterization of a judicial sale of ships
- Method to recognize a judicial sale of ships
- The (exclusion from) Judgment Conventions
- The (inclusion in) Brussels Ia Recast Regulation
- The compatibility with Service of Documents Convention/Regulation
- Uniform rules
- 1993 Maritime Liens and Mortgages Convention

# Characterization



# Method to recognize a judicial sale

- A judgment ordering the sale is a **legal fact** to be considered in determining the property rights of the parties?
  - **Domestic conflict rules** apply, in particular the *lex situs*, but that gives rise to uncertainty because of the time element (“conflict mobile”) that appears to be solved in some legislations resorting to the *lex registrationis*
  - Public policy clause
- In the end, the law applicable is the *lex fori processus*, that where enforcement is feasible because the asset is physically located there

Court of Cassation of France, *Coopérative du lamanage des Ports de Marseille et du Golfe de Fos v. Cruise Invest One S.A.*, Case No. 02-18.201, Judgment, 4 October 2005, indicating that there is no need for the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters to give effect to those rights.

# Method to recognize a judicial sale

Article 12(1) of the 1993 Maritime Liens and Mortgage Convention // articles 5(1) and 6(1) of Beijing Draft

In the event of the forced sale of the vessel in a State Party, all registered mortgages, “hypothèques” or charges, except those assumed by the purchaser with the consent of the holders, and all liens and other encumbrances of whatsoever nature, shall cease to attach to the vessel, provided that:

- (a) at the time of the sale, the vessel is in the area of the jurisdiction of such State; and
- (b) the sale has been effected in accordance with the law of the said State and the provisions of article 11 and this article.

# Method to recognize a judicial sale

- Judicial sale of ships entails the **involvement of a public authority**, thereby recognition and enforcement of decisions is appropriate and can live with the conflict-of-laws approach taken in the 1993 MLM Convention
- What is the object of this type of recognition?
  - The enforcement title?
  - The **judgment ordering the ship sale** (as contained in the certificate of sale or any other document such as a bill of sale)?

# The (exclusion from) Judgments Conventions

- “judgment” defined as “any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention ” (article 3(1)(b)).
- However, “enforcement orders, such as **garnishee orders or orders for the seizure of property**, do not qualify as judgments” on the grounds that they are not decisions “on the merits”: see Garcimartín and Saumier, “Judgments Convention: Revised Draft Explanatory Report” (footnote 1), para. 82.

# The (inclusion in) Brussels Ia Recast Regulation

- ‘**judgment**’ means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or **writ of execution**, as well as a decision on the determination of costs or expenses by an officer of the court (art. 2(a)).
- ‘**authentic instrument**’ means a document which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which:
  - (i) relates to the signature and the content of the instrument; and
  - (ii) has been established by a public authority or other authority empowered for that purpose



# The (inclusion in) Brussels Ia Recast Regulation

- **Extensive** definition of judgment:
  - There is no requirement for it to be *res iudicata* or final
  - While procedural orders are excluded, **writs of execution** issued by a court registrar are included
- According to Jenard report, authentic documents like court settlements are “**contractual in nature**” (p. 56). In contrast, a judicial sale of ships is **forced**
- Moreover, the decision transferring the property over the ship is **declaratory and is not enforceable in the Recast Regulation meaning**
- The decision ordering the transfer of ship property should be classified as a judgment.

# The (inclusion in) Brussels Ia Recast Regulation

- **Public policy** (infringement of fundamental procedure and substantive principles of the country of recognition)
  - **Notice (within public policy because this is not adversarial proceedings)**
    - To the person against whom enforcement is sought
    - But also against any other interested party
- Irreconcilable judgments
- International jurisdiction (prohibition of control)
  - Nevertheless: Article 24(5) attributes exclusive jurisdiction to the country where the enforcement proceedings are to be carried out, i.e. where the ship is physically located

# The compatibility with Service of Documents Convention/Regulation

- 1965 Hague Service of Documents Convention
- Service of Documents Regulation 1393/2007
  - Ensure that notice has been provided with all procedural guarantees including those cases where the whereabouts of the interested person are unknown
  - Technical instruments that provide means of transmission respectful of all interest involved, that of the administration of justice and the parties to the proceedings.

# Uniform rules

- Article 4 of Beijing Draft: Notice of judicial sale / **law of the State of judicial sale**/ provisions on advertisement and a repository
  - No other EU instrument in this respect (**EU Insolvency Regulation** deals with similar issues but it is not applicable to the typical cases herein discussed),
- what has an impact on the **EU/Member State competency to adhere** to a future instrument on Judicial Sale of Ships

# 1993 Maritime Liens and Mortgage Convention

- Articles 4-6, 11 Notice of judicial sale
- Article 12 Effects of judicial sale
- Limitations:
  - It only refers to judicial sale of ships in relation to maritime claims within its scope



**Thank you for your  
attention**

lc@wmu.se