

# A Brief Discussion on Judicial Sale of Ships

By Henry Hai Li\*

## Introduction

At a meeting of the Executive Council of the CMI last year, it was proposed that a preliminary study on the issues in relation to judicial sale of ships might be worthy to be conducted for the purpose of exploring future possible new topics/projects for the CMI. It was later agreed to include this topic into the program of the Athens Conference as one of the issues on which the Conference will dedicate shorter periods of time.

Unlike arrest of ships, with which the international maritime law circles are very familiar, the issues in relation to judicial sale of ships have not yet been identified as a subject necessarily to be dealt with by a particular international convention, given the fact that provisions on certain issues in relation to forced sale can be found in a few maritime conventions<sup>1</sup>. It seems suggested by this fact that it would be unnecessary to have or the relevant issues are too simple or too difficult to be covered by a particular international convention. Upon the preliminary study, it is revealed that the subject covering the issues in relation to judicial sale of ships is a rather comprehensive one, especially from an international standpoint or in the

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<sup>1</sup> For example, Article 11 and Article 12 of the International Convention on Maritime Liens and Mortgages 1993 are entitled “notice of forced sale” and “effects of forced sale” respectively. And, similar provisions can also be found in the 1967 Convention.

international context. As a matter of reality, a number of problems, in particular the recognition of judicial sale of ships by a foreign court, have been encountered by the international shipping industry, thus solutions to these problems should be explored and adopted. For the purpose of this paper, the discussions will be focused on the following primary issues in relation to judicial sale of ships, namely, the concept, the titles, the effects, the international recognition, etc.

### **The concept: “judicial sale” v. “forced sale”**

As known, provisions on “notice of forced sale” and “effects of forced sale” are contained in the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages 1967 (hereinafter referred to as the “1967 Convention”) and the International Convention on Maritime Liens and Mortgages 1993 (hereinafter referred to as the “1993 Convention”). It goes without saying that the aforesaid “forced sale” refers to the sale of ship ordered by a court after the ship is being arrested or seized for the purpose of enforcement of a maritime lien or mortgage or hypothec or charges of the same nature on ships. However, no definition on the term “forced sale” can be found in these conventions. Perhaps, it is also true for all other maritime conventions. Therefore, it might be interesting to ask, what kind of sales is exactly covered by the term “forced sale” in the aforesaid conventions.

As interpreted by the *Black’s Law Dictionary*, the term “forced sale” means: “1. See *execution sale*. 2. A hurried sale by a debtor because of financial hardship or a creditor’s action”.<sup>2</sup> It is understood that the foregoing second interpretation represents an opposite term to “*voluntary sale*”, while the first

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<sup>2</sup> Bryan A. Garner, *Black’s Law Dictionary*, (8<sup>th</sup> Ed. 2004), p. 1365.

interpretation, i.e. the term “*execution sale*” is interpreted by the same dictionary to mean “a forced sale of a debtor’s property by a government official carrying out a writ of execution.”<sup>3</sup> It seems clear that the “*execution sale*” is one of the 2 kinds of “*forced sale*”. In addition, it should be noted that the *Black’s Law Dictionary* also explains that the “*execution sale*” may be “also termed *judicial sale, judgment sale, sheriff’s sale*”<sup>4</sup>, while the term “*judicial sale*” is interpreted to mean “[A] sale conducted under the authority of a judgment or court order, such as an execution sale.”<sup>5</sup> In light of the interpretations of the *Black’s Law Dictionary*, it seems that the term “*forced sale*” and the term “*judicial sale*” in one context may mean the same thing. Whereas, in another context, the term “*forced sale*” may have a broader meaning than the term “*judicial sale*”. The latter carries more emphasis on or restrictions to the authority of a judgment or court order. It is interesting to note, as a matter of reality, in some countries, for example, in China, the term “*forced sale*” is wide enough to cover an auction entrusted or pursued by a government agency, such as the Customs. And, this kind of sale or auction is conducted without any involvement or control of a court<sup>6</sup>. For these reasons, it might be more appropriate to use the term “*judicial sale*” than the term “*forced sale*” in the context of involuntary sales of ships ordered or pursued by a court exercising its maritime jurisdiction.

## The “titles”

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<sup>3</sup> *Ibid.*, p. 1346.

<sup>4</sup> *Ibid.*, p. 1364.

<sup>5</sup> *Ibid.*, p. 1365.

<sup>6</sup> It is provided for by the second paragraph of Sub-paragraph (3) of Article 9 of the Regulations of the People’s Republic of China on Implementing Customs Administrative Penalty that “means of transport specially used for smuggling or goods or articles specially used for shielding smuggling, as well as means of transport used for smuggling or goods or articles used for shielding smuggling three times or more within two years shall be confiscated.” It is further provided for by Article 53 of the Law of the People’s Republic of China on Administrative Penalty that “with the exception of the confiscated article or goods that should be destroyed in accordance with law, the illegally property or things of value that have been confiscated according to law shall be sold by public auction in accordance with the regulations of the State or shall be disposed of in accordance with relevant State regulations.” In light of the provisions, a ship specially used for smuggling may be confiscated by the Customs and auctioned in accordance with the regulations of law without involvement of any court.

As known, for the purpose of obtaining security for a maritime claim, a ship may be arrested only based upon one of the maritime claims recognized by law. This is the rule laid down by Article 2 of the International Convention Relating to the Arrest of Sea-Going Ships 1952, which has been ratified or accepted by more than 80 countries or regions<sup>7</sup>. Whereas, for the purpose of enforcement of a payment obligation which has been adjudicated or to be adjudicated, many kinds of enforceable instruments may be based upon to have a ship arrested or seized leading to a judicial sale. The enforceable instruments recognized by law are in some countries referred to as titles for enforcement. And, the scope of the titles for enforcement may vary from country to country. For example, in China, according to the relevant provisions of the Civil Procedure Law<sup>8</sup>, the titles which are enforceable by the People's Courts shall include judgment, court order, conciliation statement, arbitration award, notarized deed of debt, etc. But, mortgage or hypothecation deeds are not included in the titles as being recognized by the Chinese law.

It is my observation that in some cases a judicial sale of ship is effected for the enforcement of a judgment or an arbitral award prescribing certain payment obligations to be performed by the shipowner; while in some other cases it is effected for the purpose of enforcing a court order, such as an order for the appraisal and sale of a ship under arrest which is applied for by a maritime claimant before a judgment is issued on the merits of the claim(s) giving rise to the arrest.

In light of the above, it seems true that the titles based on which a judicial sale of ship can be initiated, may cover a wide range of varieties, which may be in the form of a judgment or a court order or an arbitral award, etc.

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<sup>7</sup> [http:// www.comitemaritime.org/year/2007\\_8/pdf/files/YBK\\_07\\_08/contents/brussels.pdf](http://www.comitemaritime.org/year/2007_8/pdf/files/YBK_07_08/contents/brussels.pdf)

<sup>8</sup> Reference is made to the provisions of Part 3 of the Civil Procedure Law of the PR China.

Therefore, it follows that the titles for judicial sale of ships may represent debts of different nature and character. For example, for the debts affirmed by a judgment or an arbitral award, they may be of maritime nature or non-maritime nature, and among the debts of maritime nature, they may, but nevertheless may not relate to the ship to be sold by way of judicial sale. For further example, for the debts represented by a court order, such as an order of sale of a ship under arrest which is applied for by a maritime claimant for obtaining security, the debts represented by this kind of court orders are merely unadjudged debts which have not yet been affirmed by a judgment or an arbitral award. Therefore, the debts represented by this kind of court orders are just pending claims which are different from those which have been adjudged through litigation or arbitration proceedings. Since the titles based on which a judicial sale of ship may be initiated may vary from case to case, and the debts sought to be satisfied by the proceeds of a judicial sale of ship may be of different nature and character, it seems correct to say that the judicial sale of ships may be used or pursued for satisfaction of not only maritime debts, but also non-maritime debts which are irrelevant to enforcement of maritime claims or maritime liens or mortgages/hypothèques on a ship or the ship to be sold by way of judicial sale.

Bearing in mind of the above, it seems that two issues in respect of the titles for judicial sale of ships might be worthy for further consideration and discussion. The first one is whether or not it is necessary to provide by law or international convention a special closed list of titles for judicial sale of ships, by which it means that titles not included in the list shall not be allowed to initiate the procedures for judicial sale of ships. The second one is whether or not it is a good idea to include the rules or provisions on judicial sale (or forced sale) into the conventions designated to deal with the

issues in relation to recognition and enforcement of maritime liens and mortgages/hypotheques on ships, such as the 1967 Convention or the 1993 Convention. Or, alternatively whether or not it is more appropriate to subtract those rules or provisions from the said conventions, and put them into a convention to be designated to deal with the issues in relation to judicial sale of ships, than to keep those rules or provisions in the said conventions, which may come into effect at a time now nobody can tell. The questions should of course be open for discussions. And, hopefully the answers thereto may be helpful in finding a way to solve the problems encountered by the international shipping industry in respect of recognition of foreign judicial sale of ships, which will be discussed further in the paragraphs below.

### **The effects**

As correctly observed by Mr. Justice Sheen in the case, the “*Cerro Collorado*”, “from time to time almost every shipowner wants to borrow money from his bank and to give as security a mortgage on a ship. The value of the security would be drastically reduced if, when it came to be sold by the Court there was any doubt as to whether the purchaser from the Court would get a title free of encumbrances and debts.”<sup>9</sup> It is also true that “[N]obody in fact would be prepared to pay the market price for a vessel when there is then the risk that pre-existing claims may still be enforceable against the ship, particularly because a recovery against the previous owner would not be successful.”<sup>10</sup>

From the above, it is obvious that in order to find a purchaser for a ship to be sold by way of judicial sale, or for the purpose of accomplishing a

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<sup>9</sup> The “*Cerro Collorado*” (1993) 1 Lloyd’s Rep. 58.

<sup>10</sup> UN ESCAP, Guide-lines for Maritime Legislations, p. 262.

judicial sale of ship, assurance must be given to the purchaser that the title to the ship acquired by him from the judicial sale is a clean one and is free of all charges or encumbrances of whatever nature, and is good against the world. For these reasons, a number of legal effects of judicial sale of ships must be affirmed and recognized by law on the ship, the relevant parties, the relevant ship's register, or more exactly the whole world. The legal effects of a judicial sale of ship which are necessarily to be affirmed and recognized by law should at least include the followings.

- (1) The pre-sale ownership over the ship must be extinguished or be put to an end. In other words, once a judicial sale of ship is accomplished, the former shipowner of the ship shall not be entitled or allowed to pursue any right or title of whatsoever nature against the ship or the purchaser;
- (2) The mortgages/hypothèques, maritime or other liens, and all kinds of security rights attached to the ship before the judicial sale shall be extinguished and ceased to attach to the ship, except those assumed by the purchaser with the consent of the relevant holders; in other words, apart from those assumed by the purchaser, no charges or encumbrances of any security nature on the ship shall remain attaching to or be allowed to be enforceable against the ship after the ship is sold by way of a judicial sale;
- (3) The charges or encumbrances created by a charter party or a contract for use or lease of the ship or all kinds of rights to use the ship and benefit therefrom attached to the ship before judicial sale shall be extinguished unless assumed by the purchaser. In other words, upon the completion of a judicial sale, any pre-sale charter party or contract for use or lease of the ship or the alike shall be ceased to have any binding effect on the purchaser; and

- (4) The nationality and the ownership of the ship registered in the name of the pre-sale shipowners, and the mortgages/hypothèques or any registrable charges of the same nature and the demise charter if any on the ship, shall be deregistered by the relevant ship's register at the request of the purchaser, and the certificates of nationality and ownership of the ship in the name of the purchaser shall be issued by the relevant ship's register at the application of the purchaser.

It can be imagined that it could be difficult or impossible to find a purchaser for a ship to be sold by way of a judicial sale, if either of the above mentioned effects is not affirmed or recognized by law. Fortunately, most of the above mentioned effects have been affirmed and recognized by the national laws of a number of countries. For example, "it had long been recognized in both Canadian and English maritime law that a court ordered sale in an action *in rem* conveyed the subject ship to the purchaser free and clear of all liens."<sup>11</sup>

### **The international recognition**

Unlike real estate, ships after being sold by way of judicial sale would in many cases call for international recognition. It is true that "[I]t would be intolerable, inequitable and an affront to the court if any party who invoked the process of the court and received its aid, and, by implication, assented to the sale to an innocent purchaser should thereafter proceed or was able to proceed elsewhere against the ship under her new and innocent ownership."

<sup>12</sup> It is also true that "[I]f it became the practice for the Courts of one country not to recognize a valid title given by a competent Court of another country, there would be chaos. It was bound to redound to the prejudice of

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<sup>11</sup> See the "Galaxias", LMLN 240, p2.

<sup>12</sup> See the "Acrux" (1962) 1 Lloyd's Rep. 409.

those who give credit to ships.”<sup>13</sup> Whereas, the following cases may illustrate some of the problems or situations which have been encountered by the international shipping industry in respect of recognition of judicial sale of ships by a foreign country.

1. The "***Acrux***", (1961) 1 Lloyd's Rep., pp 405-410.

On 16 December 1960, at a suit of a French company of necessities, the Italian steamship *Acrux* owned by an Italian company was arrested in England. Later on, appraisal and sale of the ship was ordered by the Court in order to satisfy the judgment given by the Court in respect of the claim. Whereas, the order for sale was suspended at the application of the shipowner's liquidator from Italy, but was restored as a result of the intervention of an Italian bank, being the mortgagees of the ship. The ship was sold on 27 April 1961 by the Admiralty Marshal. The proceeds of the sale are less than the sum claimed by the mortgagees. The Court was later informed by the Admiralty Marshal that the purchaser of the *Acrux* was unable to secure permanent registration of the ship in his desired country, because he was unable to obtain certificate of deletion from Italian Register of Ships, evidencing that the order for sale of the Admiralty Court was not recognized in Italy and that according to Italian law, the mortgagees could start an executive procedure on the ship not only in Italy but even in other countries. For this reason, an undertaking is required from the mortgagees by the Court not to commence proceedings *in rem* or any similar proceedings abroad against the *Acrux* in respect of the claims pursued by the mortgagees in the motion before the Court.

The undertaking was given by the mortgagees as required by the Court, but

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<sup>13</sup> See supra. p. 407.

no report was made if the purchaser obtained the necessary certificate of deletion from the Italian Register of Ships and secured the permanent registration of the ship in his desired country.

2. The “*Galaxias*”, (1988) LMLN No.240, p2.

In September 1986, the Greek registered ship, the *Galaxias* was arrested in Canada, and several claims were made on the ship, including a “somewhat novel” claim for a maritime lien purportedly legislated by the Greek government in favour of the Greek Seamen’s Union. Later on, a Sheriff of British Columbia was appointed as a Deputy Marshal to carry out the commission of sale of the *Galaxias*. The ship was sold according to the order of the court “as is, where is” and “free and clear of all encumbrances”. Whereas, the purchaser soon became uneasy with respect to the attitude taken by the Minister of Merchant Marine in Greece regarding the transfer of title of the *Galaxias* clear of all encumbrances in the Greek Shipping Registry in Piraeus. The Minister objected to the issuance of the necessary Deletion Certificate and made it contingent on the satisfaction of the claims raised against the *Galaxias* by the Greek Seamen’s Union.

The Sheriff commenced an action against the purchaser seeking a declaration that he had fulfilled his duty with respect to the order of sale or commission of sale, and that the bill of sale did convey title in the *Galaxias* to the purchaser “free and clear of all encumbrances.” On the other hand, the purchaser filed a defence and counterclaimed with respect to the costs and damages which it claimed were brought about by the failure of the Deputy Marshal to convey the ship “free and clear of all encumbrances”, and as it presently stood, unregistrable in the Greek Shipping Registry.

It was held by the court, *inter alia*, that on one hand the plaintiff was entitled

to the declaration sought by him, on the other hand, the purchaser would take free and clear of all encumbrances according to the laws of Canada, and although the Canadian courts desired and expected that the courts and governments of other nations would respect their orders and judgments, particularly in the area of maritime law, that was not an area over which the Federal Court exercised control. In addition it is also held by the court that “[I]f there were other jurisdictions which would ignore the effect of the judicial sale in Canada, that was a political problem in respect of which the Federal Court of Canada could be of no assistance.”<sup>14</sup>

It was not reported if the purchaser obtained the necessary Deletion Certificate from the Greek Shipping Registry before or after satisfaction of the claims raised against the *Galaxias* by the Greek Seamen’s Union.

### 3. The “*Great Eagle*”, 1994 (1) SA 65 (C)<sup>15</sup>

In July 1991, a Cypriot company (the “Claimant”) instituted an action in *rem* against a Panamanian company (the “Respondent”), which was commenced by the arrest of the motor ship *Greet Eagle* at Saldanha Bay, South Africa. The main claim is for a *declarator* that the Claimant is owner of the ship and entitled to its possession. The alternative claim, on the premise that the Claimant is not the owner and that the owner is liable to the Claimant in *personam*, is for the recovery of damages in the amount of 4.4 million US dollars arising from the concerted fraudulent actions of a number of parties which resulted in the Claimant being dispossessed of the ship at Qingdao, the PR China, and the Respondent’s becoming its current registered owner.

It is accepted by the Respondent that up to 30 May 1991 the Claimant was

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<sup>14</sup> See the *Galaxias*, LMLN 240, p.2.

<sup>15</sup> The judgment was delivered on 28 October 1991.

the owner and under his ownership the ship was named *Mnimysyni*, but it was on that day the ship was auctioned by Qingdao Maritime Court, the PR China, and as the purchaser of the ship under the judicial sale the Respondent became the owner since then. The Respondent filed an application for the release of the ship and argued on three grounds, namely (1) as a matter of statutory interpretation, the Act<sup>16</sup> does not empower an action in *rem* where the action and the arrest are directed at the claimant's own ship, as is the case in a vindictory claim; (2) the Claimant has no *prima facie* case justifying the action and the accompanying arrest; and (3) the Court is not the appropriate forum and jurisdiction should be declined in terms of the Act.

It is concluded by the Court that (1) where a claimant seeks to vindicate his ship, the Act empowers him to arrest and take proceedings against it *in rem*. It follows that applicant's first ground fails; and (2) the claimant has failed to make out a *prima facie* case in respect of the causes of the action, that means the second ground on which the applicant has based his application is good. Being so, it is unnecessary to deal with the third ground, namely the *forum non conveniens* point. It is ordered by the Court *inter alia* that the ship be released from arrest and that the Claimant's action is dismissed with costs.

It might be interesting to mention that in another action<sup>17</sup> following the second arrest of the ship for the same matter commenced by the abovementioned Claimant, views in respect of the *forum non conveniens* point were expressed by the Court that if the Claimant is advised that it has a *prima facie* case against the Respondent, the appropriate forum to have such case established is a Chinese Court, and not a South African one.

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<sup>16</sup> The Act refers to the Admiralty Jurisdiction Regulation Act 105 of 1983.

<sup>17</sup> 1992 (4) SA 313 (C), the judgment was delivered on 9 April 1992.

4. The “*Union*”, 2005 Jin Hai Fa Shang Chu Zi No. 401.

On 24 June 2005, the ship, *Union*, which is registered in Belize was arrested by Tianjin Maritime Court of the PR China at the application of a French bank based in Paris, for enforcement of a mortgage on the ship *Phoenix*, which is the former name of the ship now registered with the name of *Union*. The mortgage was effected on the ship *Phoenix* for the purpose of securing a loan in the sum of 5 million US dollars, and registered on 4 November 1999 in St. Vincent and the Grenadines, and was further registered in Russia in later November 1999 when the ship was bareboat chartered to a Russia company. In order to recover from the borrower the outstanding balance of the loan which is in the sum of 2 million US dollars, a judgment has been obtained in the mortgagee’s favour from the Commercial Court of Paris in September 2003. However, the judgment is not performed or satisfied by the borrower. In the lawsuit filed with the Chinese Maritime Court by the French bank, it was claimed that the duly registered mortgage on the ship *Phoenix*, of which the current name is *Union*, should be recognized by the Court and enforceable on the ship irrespective of the change of her name and registration. On the other side, the current registered owner of the ship filed a defence and counterclaimed with respect to the costs and damages which were allegedly brought about by the wrongful arrest of the ship by the French bank. It was maintained by the current shipowner that the ship, *Phoenix*, was arrested in May 2003 and auctioned in November 2004 by the Court of Rason, the Democratic People's Republic of Korea (hereinafter referred to as the “DPRK Court”) at the applications of a number of claimants for unpaid crew wages and port charges, and for repayment of outstanding loans. The purchaser of the ship is a local company, who after the sale registered the ship on a temporary basis with the local maritime administration under its name with

a new ship's name of *Rason*. In June 2005, the purchaser sold the ship to the current shipowner who in turn registered the ship in Belize on 7 July 2005 under its name with the current ship's name, i.e. *Union*. Apart from the above, it is investigated by the Maritime Court that after the sale of the ship by the DPRK Court the registration of the ship and the mortgage in St. Vincent and the Grenadines was not deleted.

Due to the fact that neither of the parties has requested to apply or provided any material to prove the contents of the applicable foreign laws (including the laws of St. Vincent and the Grenadines, the DPRK and Belize), the Chinese Maritime Court applied the PRC laws to all the issues disputed in this case.

It was held by the Maritime Court *inter alia* that (1) after the sale of the ship by the DPRK Court, all charges and encumbrances, including the French bank's mortgage on the ship are all extinguished given the fact that the registration of the ship and the mortgage in St. Vincent and the Grenadines was not deleted; (2) it is only a legal fact to be investigated and considered by this Court if the ship was once sold by the DPRK Court, that does not involve any recognition or enforcement by the PRC court of any judgment or order of the DPRK Court; and (3) it is not within the jurisdiction of this Court to examine and judge whether or not the ship sold by the DPRK Court was in accordance with the DPRK law, including whether or not a proper notice has been sent to the French bank and/or the ship's register in St. Vincent and the Grenadines. Based on these grounds, the claims of the mortgagee were dismissed by the Maritime Court. In addition, the appeal by the mortgagee was also rejected by the High Court of Tianjin<sup>18</sup>.

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<sup>18</sup> See Judgment [2006] Jin Gao Min Si Zhong Zi No. 95

As can be seen from the above cases, the issues involved in each of the cases are not exactly the same, but the problems behind them are all in relation to recognition of judicial sale of ships by a foreign court. And, it seems that the following issues are calling for special attention.

(1) The deregistration and registration

As illustrated in the above cases, in particular the “*Acrux*” and the “*Galaxias*”, if a judicial sale of ship in a foreign country is not recognized in the country where the ship was registered, it could be difficult or even impossible for the purchaser to delete the previous registration or to get a certificate of deregistration of the ship from the ship’s register, as a consequence the purchase would not be able to register the ship in his desired country. On the other hand, as shown in the cases, the “*Great Eagle*” and the “*Union*”, if a ship after a judicial sale may be registered in a country before or without deregistration of the ship (including her nationality, ownership, mortgage, etc.) in her previous country of registration, it would cause problems, such as duplicate or multiple registrations of the same ship are concurrently maintained in two or even more countries. In addition, it might amount to a violation of the customary rule of international law, for “[I]t is in fact a customary rule of international law, now embodied in the 1967 Brussels Convention, that in case of change of nationality a vessel may not be registered in the new register unless she is de-registered from her previous register.”<sup>19</sup>

It is to be noted that as a matter of fact rules concerning deregistration and registration of ships following forced sales are contained in both the 1967 Convention and the 1993 Convention. But the questions which may be

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<sup>19</sup> See UN ESCAP, Guide-lines for Maritime Legislations, p. 262.

asked here are (1) whether or not the said rules are good enough to be applicable not only to the forced sale for enforcement of maritime liens and mortgages on ships, but also to all kinds of judicial sale of ships, and (2) if the answer to the first question is in affirmative, what steps can be taken to make those rules widely accepted and followed by the international shipping industry.

## (2) The Notice

It was claimed by the French bank in the above case, the “*Union*”, being the holder of a duly registered mortgage on the ship, no notice was received by them that the mortgaged ship was to be sold by the DPRK Court, and as a consequence they were not able to take any step to protect their lawful rights and interests, including to take part in the procedures of distribution of the proceeds of the ship. If this is true, it is certainly not something that should happen. As a matter of principle, it should be accepted and followed that prior to a judicial sale of ship, a proper notice of the time, venue and all other necessary particulars of the sale should be sent in advance to all related parties, such as the registered owner of the ship, the registered demise charterer, the holders of mortgage or hypothec on the ship, the known holders of maritime and other liens on the ship, the ship’s register, etc., so as to ensure that steps may be taken by each of them to protect their respective rights and interests in connection with the ship to be sold by way of judicial sale.

As mentioned above, Article 11 of the 1993 Convention is entitled “Notice of forced sale” and provisions thereon can be found in this article, and similar provisions are contained in Article 10 of the 1967 Convention. But, it is unfortunate that neither of these conventions has come into force.

Therefore, a similar question which can be asked here again is that what steps may be taken to make the rules in respect of notice of judicial sale an international obligation to be performed by the countries in which judicial sale of ships is to be pursued.

### (3) The Validity

As can be seen from the above cases, in particular, the “*Great Eagle*” and the “*Union*”, the plaintiffs were trying to challenge the validity of the judicial sale of the ship effected in a foreign country. In the case, the “*Great Eagle*”, the sale of the ship by the Chinese Maritime Court was claimed by the previous shipowner to be “concerted fraudulent actions of a number of parties”, while in the case, the “*Union*”, the sale of the ship by the DPRK Court was claimed by the registered mortgagee to be not in accordance with the DPRK law, and no notice of the sale was given to him and the ship’s register. It seems that the challenges are all in relation to recognition of the validity of a judicial sale of ship by a foreign court.

In light of the statement made by Mr. Justice Hewson in the above case, the “*Acrux*”, that “[T]he court recognizes proper sales by competent Courts of Admiralty or Prize, abroad—it is a part of the comity of nations as well as contribution to the general well-being of international maritime trade”,<sup>20</sup> it seems that for an English court to recognize a sale by a foreign court, there are at least two conditions, namely, (1) the sales must be “proper sales” and (2) by “competent courts”, the true meaning of these words under English law are matters to be advised by English lawyers. The provisions contained in Article 12 of the 1993 Convention seem suggesting that for a forced sale of ship in one country to be recognized in other countries as having the

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<sup>20</sup> See the “*Acrux*” (1962) 1 Lloyd’s Rep. 409.

effect that all registered mortgages, hypothèques or charges shall cease to attach to the ship, the sale must meet with the following two conditions, i.e. (1) at the time of sale, the ship is in the area of the jurisdiction of the country, and (2) the sale has been effected in accordance with the law of the country and the provisions of Article 11 and Article 12 of the Convention.

Based on the above, it seems obvious that for a judicial sale of ship in one country to be recognized by other countries as a valid and effective one, the sale must meet with certain conditions or criteria acceptable to the other countries. Or, otherwise it would be difficult for the other countries to recognize the validity or effectiveness of the sale. Needless to say, it is desirable that the said conditions or criteria may be set forth in an international convention being widely ratified or accepted by the maritime nations.

#### (4) The Jurisdiction

If the validity or effectiveness of a judicial sale of ship by a foreign court is challengeable, then it would draw forth the question that which court shall have jurisdiction over the disputes concerning the validity or effectiveness of a judicial sale of ship.

The question is answered by the South African Court in the abovementioned case, the "*Great Eagle*", that the appropriate forum to have such case is the court of the country where the challenged sale of ship is effected. The answer is made on basis of the well-known principle, i.e. "*forum non convenienc*". In addition, the question is also answered by the Chinese Maritime Court in the abovementioned case, the "*Union*". By emphasizing the principle that "sovereignties are equal and neither of them

shall have jurisdiction over the other”, it is held by the Chinese Maritime Court that it is not within the jurisdiction of this Court to examine and judge whether or not the ship sold by the DPRK Court was in accordance with the DPRK law, and that such claim should be referred in accordance with the DPRK law to the DPRK Court. The approach of the Chinese Maritime Court seems to be that to first qualify the sale by a foreign court as a legal fact only, then to apply the applicable law to determine the legal effect and/or consequence that may be given rise by such legal fact. By this approach, not only the recognition of a foreign judgment or court order is avoided but also the examination of a decision made by a court of another sovereignty is riddled.

The jurisdiction issue is not covered by the 1967 Convention nor by the 1993 Convention. It might be arguable or worthy debating if the above answers are the only or the best answers to the question.

#### (5) Other related issues

As known, the purpose of a judicial sale of ship is to satisfy the creditors of the shipowner and sometimes also creditors of someone else who is not the shipowner when their claims are secured by a mortgage or maritime lien or other charges on the ship, out of the proceeds of the sale. Therefore, it is in the common interests of the creditors and the shipowner that the ship may be sold at the highest possible price. In addition, protections should be duly balanced not only among the purchaser, the shipowner and the creditors, but also among the creditors themselves so as to ensure that all creditors in relation to the ship shall have an equal opportunity to take part in the procedure of distribution of the proceeds.

As a matter of fact, apart from the prior notice to be sent to the related parties, there are a number of other issues necessarily to be dealt with by the rules regulating the procedure of judicial sale of ships, such as the valuation, the basic price, the conditions for bidding, the conduct of the auction, etc. It is certainly desirable to have a set of internationally accepted rules regulating the procedure of judicial sale of ships, or at least to set forth the key principles which should be followed in formulating the rules regulating such procedure.

### **The conclusion**

While ships are being arrested in one country or another, and some of the ships are sold by court for enforcement of maritime or non-maritime claims, problems in relation to judicial sale of ships have been encountered by the international shipping industry and are calling for consideration and solutions.

Based on the belief that “[I]n view of the forced sale being the normal manner whereby mortgages and hypothecs as well as maritime liens are enforced, provisions on forced sale of ships found a proper place in a convention on maritime liens and mortgages,”<sup>21</sup> provisions on “notice of forced sale” and “effects of forced sale” are included in the 1967 Convention and the 1993 Convention. Unfortunately, neither of them has become a widely adopted international convention. On the other hand, as pointed out in this paper, judicial sale of ships is not only the normal manner for enforcement of maritime liens and mortgages or hypothecs on ships, but also can be used for enforcement of a wide range of titles which are not necessarily in connection with enforcement of maritime liens and

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<sup>21</sup> See UN ESCAP, *Guide-lines for Maritime Legislations*, p. 262.

mortgages or hypothecs on ships. Furthermore, the subject covering the issues in relation to judicial sale of ships is a rather comprehensive one, which means that in addition to the issues in respect of the notice and the effects of judicial sales, a number of other issues are also necessary to be dealt with by an international convention. In other words, it is desirable to have a particular international convention to set forth those principles or rules which should be followed by the maritime nations in which judicial sale of ships is effected or to be recognized.

Last but not the least, it must be admitted that this paper represents only a preliminary study on some of the issues in relation to judicial sale of ships. It is hoped that by this paper the question that whether or not it is necessary and feasible for the CMI to launch a new project in relation to judicial sale of ships will be considered, discussed and answered by the international maritime law circles at this conference and afterwards.