

**A Brief Introduction to the Topic
on Recognition of Foreign Judicial Sales of Ships**

by Henry Hai Li¹

It is believed that the topic covering the issues in respect of judicial sales of ships is a rather comprehensive one, and recognition of foreign judicial sales of ships is one of the most important aspects of this topic. In reality, a number of problems in relation to recognition of foreign judicial sales of ships are encountered by the international shipping industry from time to time. It is hoped that solutions to these problems may be found and adopted with CMI's efforts.

The Project

At a meeting of the Executive Council of the CMI in 2007, it was proposed that a preliminary study on the issues in relation to judicial sales of ships might be worthy to be conducted for the purpose of exploring future possible topics/projects for the CMI. It was later agreed to include this topic into the program of the CMI Athens Conference in 2008 as one of the issues to be discussed at the Conference.

At the CMI Athens Conference in 2008, a paper entitled "A Brief

¹ Henry Hai Li, Chairman of the CMI International Working Group on Judicial Sales of Ships.

Discussion on Judicial Sales of Ships”, focusing on international recognition on foreign judicial sales of ships, was presented, which was followed by another presentation highlighting some tentative issues in relation to sales of ships and the tentative answers from the Belgian prospective. After the presentations, a number of people showed their interests in this topic and volunteered to participate in the future work on this topic.

With the approval by the CMI Executive Council, an international working group on judicial sales of ships (the “IWG”) was formally established after the Athens Conference. Now, the IWG consists of the following members,

Henry Hai Li	Chairman	China
Jonathan Lux	Rapporteur	UK
Andrew Robinson	member	South Africa
Benoit Goemans	member	Belgium
Frank Smeele	member	Netherlands
Louis Mbanefo	member	Nigeria
Aurelio Fernandez	member	Venezuela
Klaus Ramming	member	Germany
Francis Nolan	member	USA

The Questionnaire and the Replies

After the establishment of the IWG, the members of the IWG spent quite some time in collecting, summarizing and analyzing information and materials concerning cases in a number of jurisdictions in relation to recognition on foreign judicial sales of ships. After discussions within the IWG, a draft questionnaire on judicial sales of ships was formulated and submitted on 5 May 2010 to the CMI Executive Council for comments and approval. The Executive Council proposed a number of changes or revisions on the contents of the draft questionnaire. Mr. Giorgio Berlingieri made a very lengthy and constructive proposal on the draft questionnaire. Mr. Andrew Taylor reworked on some of the text to make the questionnaire much clearer in the English language. The questions in the final questionnaire are divided into 5 groups. The headings of the 5 groups are respectively as follows: “The concept of judicial sales of ships”, “The key procedural elements of judicial sales of ships”, “The effects of judicial sales of ships”, “Recognition of legal effects of foreign judicial sales of ships”, and “The necessity and feasibility to have an international instrument on recognition of foreign judicial sales of ships”. A copy of the Questionnaire is attached hereto for easy reference.

The CIM Questionnaire was sent to the national maritime law associations on 17 May 2010 and replies to which were invited to be sent back to the CMI by the end of July 2010, so as to ensure that the IWG may have

sufficient time to summarize and analyse the replies and to make necessary preparation for the discussion at this Colloquium. On 17 August 2010 a reminder for replies was sent to the national maritime law associations suggesting that replies should be sent to the CMI before the end of August 2010 so as to enable the IWG to take account of the reply in the preparation for the discussion at this Colloquium.

At the time of 19 September 2010, replies to the Questionnaire were received from 18 national maritime law associations, including Argentina, Belgium, Brazil, Canada, China, Denmark, Dominica, France, Germany, Italy, Malta, Nigeria, Norway, Singapore, South Africa, Sweden, USA, and Venezuela. In addition, a reply to the Questionnaire was also received from a CMI Titulary member in Spain². Before the Colloquium, replies were also received from the maritime law associations of Japan, Slovenia and Croatia,

The Discussion at this Colloquium

It is planned that the discussion on this topic at this Colloquium will be co-chaired by Henry Hai Li and Jonathan Lux. And, there will be 5 papers prepared by the members of the IWG, each will deal with one of the 5 groups of questions contained in the Questionnaire. Mr. Aurelio

² This titulary member is Prof. José Maria Alcantara.

Fernández-Concheso will deal with the first 1 group of questions; Mr. Benoit Goemans with the second group, Mr. Louis Mbanefo with the third group, Mr. Frank Smeele with the forth group, and Mr. Andrew Robinson with the fifth group. It is hoped that after the presentation of these papers, comments and proposals will be received from the attendants to this session. It is also hoped that the discussion at this colloquium may be helpful to the IWG in finalizing its report to the CMI Executive Council.

Comité Maritime International

QUESTIONNAIRE

in respect of Recognition of Foreign Judicial Sales of Ships

After the CMI Athens Conference in 2008, the CMI Executive Council has set up an International Working Group (the “IWG”) to investigate problems in relation to the judicial sale of ships, in particular:

- (i) issues in respect of international recognition of foreign judicial sales of ships; and
- (ii) the necessity and feasibility of producing an international instrument on this subject.

This Questionnaire is intended to gather as much information as possible about the judicial sale of ships in your jurisdiction and your views on certain related issues. The questions contained in this Questionnaire are divided into 5 groups, each of which has a heading that indicates the core issue of the questions of this group. It would be greatly appreciated if the questions could be answered with not only a “yes” or “no”, but also with as many comments and/or explanations as possible. If more information about this subject is required, reference may be made to a paper which can be found at pages 342-356 of CMI Yearbook 2009 Athens II, or downloaded at the website, i.e. <http://www.cmi2008athens.gr/sub9.1.pdf>.

We would be most grateful if you could provide your responses to this Questionnaire as soon as possible, preferably before the end of July 2010, so that the IWG has sufficient time to make necessary preparations for the discussion to be conducted at the forthcoming CMI colloquium at Buenos Aires in this October. If you have any queries regarding this Questionnaire, please feel free to contact the Chair of the IWG, Dr. & Prof. Henry Hai Li at henryhaili@yahoo.com.cn.

1. The concept of judicial sales of ships

Note:

The IWG is aware that in many jurisdictions judicial sale is termed differently, such

as forced sale or court sale, etc. and that judicial sales of ships may be initiated or conducted for various purposes, such as to enforce a maritime lien or mortgage on a ship, to enforce an effective judgment or arbitral award, or to preserve a maritime claim taking the ship as a wasting asset. It is hoped that your answers and comments to the questions within this group will help to produce a proper definition of judicial sales of ships for the purpose of this project and/or the future international instrument.

- 1.1 Is the term judicial sale or judicial sale of ship (or a similar term such as forced sale) defined in the law of your jurisdiction? If yes, please provide the definition. If not, please explain what kind of sale of ship equates to a judicial sale of ship by which all liens or charges or encumbrances attached to the ship before the sale will be extinguished?
- 1.2 For what purpose may a judicial sale of ship be initiated and conducted in your jurisdiction?
- 1.3 In what circumstances and on what conditions may a judicial sale of ship be initiated and conducted in your jurisdiction?
- 1.4 Will a judicial sale of ship in your jurisdiction necessarily be conducted by or under the control of a court?
- 1.5 Is auction the only method of judicial sale of ships in your jurisdiction? If not, please list and explain in detail all other ways, such as private treaty, which may be used for judicial sales of ships?

2. The key procedural elements of judicial sales of ships

Note:

Based on the understanding that judicial sales of ships may occur in different kind of actions (such as an action *in rem*, an action *in personam*, an action for conservation or an action for enforcement) the procedures for judicial sales of ships may vary. It is hoped that the answers and comments to the questions in this group will help to establish the most common elements or the basic characteristics of the procedures for judicial sales of ships, and to determine the necessary procedural elements of a judicial sale of ship so that it will be internationally recognized.

- 2.1 Briefly and without going into detail, what is the general procedure or the key procedural elements of a judicial sale of ship in your jurisdiction?
- 2.2 Is it necessary to provide written notice to the register of ships in which a ship is entered before that ship is sold by way of judicial sale?
- 2.3 Is it necessary to provide written notice to the registered ship-owner before a ship is sold by way of judicial sale? And, is there any procedure by which the registered ship-owner may challenge the sale of the ship? If yes, please explain in detail.
- 2.4 Is it necessary to provide written notice to the registered mortgagees, the known holders of maritime liens and/or the known holders of other charges in respect of the ship before the ship is sold? And, is there any procedure by which the mortgagees and/or the aforesaid holders may get access to the distribution of the proceeds of the sale of the ship? If yes, please explain in detail.
- 2.5 Following the judicial sale of a ship, will a document such as an order or a certificate be issued to the purchaser by the court that conducted or controlled the judicial sale of ship, to the effect that the ship is sold free of all mortgages, liens, charges and encumbrances, or that the purchaser has acquired a clean title of the ship from the judicial sale?
- 2.6 Is there any difference in procedure if the ship to be sold by way of judicial sale is a foreign ship? If yes, please highlight the difference in detail.

3. The effects of judicial sales of ships

Note:

It is observed that once a ship is sold by way of judicial sale, certain legal effects or consequences will follow. For example, in many jurisdictions, the ownership of the previous ship-owner will cease to exist and/or the mortgages, maritime liens and other charges attached to the ship prior to the sale will be extinguished. The questions in this group are intended to collect as much as possible information

regarding your jurisdiction and to identify the most common legal effects or consequences which a judicial sale of ship may bring about. It might be worth mentioning that the questions in this group should be understood and answered without regard for any foreign elements.

- 3.1 What legal effects or consequences would a judicial sale of ship bring about?
- 3.2 Will a judicial sale of ship extinguish the previous ownership?
- 3.3 Will a judicial sale of ship extinguish all mortgages, liens, charges or encumbrances attached to the ship before the sale?
- 3.4 Will the purchaser acquire a clean title over the ship, good against the whole world, through the judicial sale of ship?
- 3.5 Will a judicial sale of ship automatically annul the previous registration of the ship (including the registration of the ship's nationality, ownership, mortgage, bareboat charter, etc.) ?
- 3.6 On production of a document such as an order or a certificate issued by the court that conducted or controlled the judicial sale of the ship, will the register of ships delete the previous registration of or deregister the ship (including the registration of the ship's nationality, ownership, mortgage, bareboat charter, etc)?
- 3.7 On production of a document such as an order or a certificate issued by the court that conducted or controlled the judicial sale of the ship, will the register of ships register the ship in its registration or enrolment regardless of whether the previous registration of the ship is deleted or not ?

4. Recognition of legal effects of foreign judicial sales of ships

Note:

It is observed that ships may be sold by way of judicial sale in one jurisdiction, while recognition of such sale may be required in another jurisdiction. Non-recognition of foreign judicial sales of ships may result in a number of

problems or conflicts of laws. In addition, it is observed that in many jurisdictions, no ready provisions of law are available as to when and/or on what conditions a foreign judicial sale of ship will be recognized as having the same legal effects as a domestically accomplished judicial sale of ship. In view of the above, it is hoped that the answers and/or comments to the questions in this group will help to gather as much information as possible about the real situation and the prevailing practices in your jurisdiction with respect to recognition of foreign judicial sales of ships.

- 4.1 Will a judicial sale of a ship accomplished in a foreign jurisdiction be recognized in your jurisdiction as having the same legal effects as the judicial sale of a ship accomplished in your jurisdiction? If yes, please list the circumstance and explain the conditions for such recognition.
- 4.2 Would a court in your country have jurisdiction over a case brought by the previous ship-owner and challenging the foreign judicial sale of a ship?
- 4.3 Would a court in your country have jurisdiction over a case brought by the holder of a maritime lien, mortgage or other charge attached to the ship prior to the foreign judicial sale of a ship and challenging the foreign judicial sale of a ship?
- 4.4. If the court in your country would have jurisdiction over the cases mentioned in Question 4.2 and/ or Question 4.3, which country's law would apply with regard to the substantive issues of the dispute?
- 4.5 If a ship which is entered in a register of ships in your jurisdiction is sold in a foreign jurisdiction by way of judicial sale, will the register of ships in your jurisdiction delete the registration of that ship upon notice of the foreign judicial sale or upon production by the purchaser of a document such as an order or a certificate issued by the foreign court that conducted and controlled the sale? If yes, please explain the circumstances and conditions in detail.
- 4.6 If a foreign ship were sold in a foreign jurisdiction by way of judicial sale, will a register of ships in your jurisdiction enter that ship in its registration regardless of whether the previous foreign registration has

been deleted?

5. The necessity and feasibility to have an international instrument on recognition of foreign judicial sales of ships

Note:

The IWG is aware of a few cases regarding the recognition of foreign judicial sales of ships. It is believed that the reported cases represent just a small part of the whole picture. On the other hand, since the International Convention on Maritime Liens and Mortgages 1993 came into force on 5 September 2004, and provisions concerning notice and effects of forced sale are contained therein, it might be sensible to consider whether it is necessary and feasible to work out an international instrument, before further resources are put into this project. For this purpose, the questions in this group are designed to gather as much information as possible on the whole picture and to identify as many real problems that have been encountered by the international shipping industry as possible.

- 5.1 Have there been any cases in your jurisdiction in which a ship has been sold by way of judicial sale and that sale has been challenged by the previous ship-owner or another interested person in a foreign jurisdiction? If yes, please list the cases and highlight the issues involved in detail.
- 5.2 Have there been any cases in your jurisdiction in which a ship has been sold by way of judicial sale in a foreign jurisdiction and that sale has been challenged by the previous ship-owner or another interested person in your jurisdiction? If yes, please list the cases and highlight the issues involved in detail.
- 5.3 Article 11 of the International Convention on Maritime Liens and Mortgages 1993 provides that notice of a forced sale must be given to various parties. Do you think that those provisions are appropriate and should they be accepted as the basic requirements for recognition of a foreign judicial sale of ship?
- 5.4 Article 12.1 of the International Convention on Maritime Liens and Mortgages 1993 sets down two conditions that must be satisfied so

that the registered mortgages or charges, liens and other encumbrances attached to a ship shall be extinguished after its forced sale. Do you think that those provisions are appropriate and should also be followed in recognition of a foreign judicial sale of ship?

5.5 Article 12.5 of the International Convention on Maritime Liens and Mortgages 1993 regulates the issuance of a certificate by the court that conducted the sale and the deregistration and registration of the ship that has been sold. Do you think that those provisions are appropriate and should they be made of general application in recognition of a foreign judicial sale of ship?

5.6 Bearing in mind that the International Convention on Maritime Liens and Mortgages 1993 has come into force and that provisions concerning notice and the effects of forced sale are contained therein, is it still necessary and feasible to have a separate international instrument, such as a convention, to deal with issues regarding the recognition of foreign judicial sales of ships?