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## ANY OTHER BUSINESS

### 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)

#### SUMMARY

*Executive summary:* This document proposes a new output for the Legal Committee to develop an international convention on the foreign judicial sale of ships and their recognition based on the draft convention prepared by CMI to ensure that the purchaser of a ship in a judicial sale can be confident of obtaining clean title to the ship

*Strategic direction:* 1 and 12.2

*High-level action:* 1.3.3

*Planned output:* No related provision

*Action to be taken:* Paragraph 10

*Related documents:* LEG 102/11/2

## 1 Introduction

1.1 This document is submitted in accordance with paragraph 4.7 of the *Guidelines on the Organization and Method of Work of the Legal Committee* (LEG.1/Circ.7) regarding the submission of proposals for new unplanned outputs.

1.2 This document provides the rationale for, and an outline of, a draft international convention on the foreign judicial sales of ships and their recognition (the draft convention) which was approved by the Assembly of the 41st International Conference of the Comité Maritime International (CMI), held in Hamburg on 17 June 2014.

1.3 Many hundreds of ships are sold each year through some competent form of judicial sale. The underlying cause or causes of a judicial sale may be numerous, but usually relate to

the non-payment of debts due and owing, and, on occasion, following forfeiture by the State. Purchasers, and subsequent purchasers, must be able to take clean title to the ship so sold and be able to de-flag the ship from its pre-sale registry and re-flag the ship in the purchaser's selected registry so as to be able to trade the vessel appropriately without the threat of costly delays and expensive litigation.

1.4 There is currently no international instrument that addresses the recognition of judicial sales. Nor is there any instrument that adequately protects purchasers from prior claims and which addresses the de-registration on re-flagging and re-registration of ships from and to national registries. Proper registration of ships is key to the sound governance of maritime safety, marine environment protection and marine technical issues.

1.5 The purpose of the draft convention is to ensure that the purchaser of a ship in a judicial sale can be confident of obtaining clean title to the ship, free of and unencumbered by any mortgages or similar liens or charges placed on the ship prior to the judicial sale and is able, against presentation of a suitable certificate issued by the court which conducted the judicial sale, to delete and re-register the ship in the purchaser's selected registry.

1.6 This, in turn, will enable the purchased ship to trade freely; and to ensure that the ship will realize a greater sale price which will benefit all the related parties, including creditors and the shipowners - and by so doing, the draft convention will promote the smooth and efficient flow of seaborne trade and a reduction in the risks associated with such trade through the cooperation of States who become parties to the convention (State parties).

1.7 The purchase of vessels is generally financed by a ship mortgage from a bank where the bank's main security for repayment is the ship itself. The draft convention will permit banks to provide ship finance confident in the knowledge that the ship will realize its full market value at a judicial sale and not the reduced value realisable where there is the risk, as at present, that the ship may be arrested for claims predating the judicial sale.

1.8 Most importantly, the judiciaries of many countries have observed that the need to recognize judicial sales by foreign, competent courts forms part of the comity of nations and contributes to the general well-being of international trade.

1.9 IMO, as the sole United Nations specialized agency with responsibility for the promotion of safe and efficient international shipping practices should, it is submitted, be part of the process in developing this much needed international framework for the judicial sale of ships.

## **2 IMO's objectives**

2.1 It is submitted that the proposal is within the scope of IMO's objectives to ensure and strengthen the linkage between safe, secure, efficient and environmentally friendly maritime transportation, and the development of global trade and the world economy. It is indisputable that the carriage of goods in ships is the cornerstone of global trade and a major driver of world economies – over 90% of world trade moves by sea.

2.2 It is further submitted that the IMO's involvement in issues of this kind has precedent as evidenced by:

- (1) the *International Convention on Maritime Liens and Mortgages, 1993* which was adopted by the United Nations/International Maritime Organization Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages held in Geneva from 19 April to 7 May 1993; and

- (2) the *International Convention on Arrest of Ships, 1999* which was adopted at the United Nations/International Maritime Organization Diplomatic Conference on Arrest of Ships held in Geneva from 1 to 12 March 1999.

2.3 Both of these conventions were convened by the Secretary-General of UNCTAD and the Secretary-General of IMO.

2.4 It is also submitted that the development of the convention could also be linked to the effective implementation of the SOLAS requirement for a Continuous Synopsis Record (chapter XI-1, regulation 5 of SOLAS), as the convention would avoid problems with registration so that the issuance of the CSR would be facilitated.

2.5 Issues relevant to the ownership and registration of ships are pivotal to the sound administration and safety of maritime transportation. The judicial sale of ships is a regular and inevitable consequence of doing maritime business. Competently conducted judicial sales should, generally:

- (1) allow claimants to satisfy debts;
- (2) provide purchasers, and subsequent purchasers, with the security that they can trade their vessel on a global basis with the knowledge that the ship can be permanently registered in a registry of their choice;
- (3) allow purchasers to trade with the vessel and ensure that trade will not be hindered by the arrest, attachment or detention of the vessel for debts that arose prior to the judicial sale;
- (4) enhance the quality of shipping through encouraging the proper management of ships by facilitating their appropriate registration.

### **3 Compelling need**

3.1 As there is currently no international instrument dealing with the recognition of foreign judicial sales of ships it can be said, with some confidence, that in this regard maritime transportation is neither secure nor efficient and hinders rather than promotes global trade and the world economy. The need for intervention by inter-governmental and international organisations has been clearly recognised both judicially and by national and international maritime bodies. The recognition of foreign judicial ship sales is fundamental to international maritime law.

3.2 The difficulties that arise when one country will not recognise an order for the judicial sale of a ship in another country has been succinctly summarised as follows:

- (1) It is an affront to the Court and the State ordering the sale;
- (2) It represents a refusal by that country to abide by the decisions of a Court in another country, and an exception to a rule honoured by every nation in the world.

- (3) If other countries, or other debtors, decided to follow this bad example, it could create confusion in the area which can be effectively controlled only with the good faith of all seafaring nations<sup>1</sup>.

3.3 The difficulty of dealing with the recognition of judicial sales at an international level has also been highlighted. In the Canadian case of the ship "*Galaxias*"<sup>2</sup> (which is summarised in annex 2) the Court noted that:

- (1) whilst a purchaser on a judicial sale will take a clean title free and clear of all encumbrances according to the laws of Canada and notwithstanding that it is clear that Canadian Courts desire and expect that the Courts and Governments of other nations will respect its orders and judgments, particularly in the area of maritime law, however this was not an area over which a national jurisdiction exercises control, nor is it appropriate that it attempt to do so;
- (2) international regulation of the judicial sales was necessary; and
- (3) in order to promote the free flow of maritime traffic, countries have, generally speaking, agreed to apply a uniform set of admiralty rules and laws. This would not, however, prevent any country from legally completely ignoring or setting aside any normally accepted practice or any law which is universally recognised in admiralty matters or even a rule of law which that country might previously have adopted by treaty. This is precisely what territorial jurisdiction means, and, until there exists some world authority with a superior globally enforceable overriding jurisdiction this is what we all must live with.<sup>3</sup>

3.4 In commenting on judicial orders for the sales of ships that did not ensure the passing of clean title, the same Court noted that admiralty lawyers and all lay people in the shipping world, involved in any way in the purchase and sale of ships, will invariably feel that this would greatly reduce the amounts which can be obtained from court sales of vessels and render some ships completely unsealable. The legitimate claims of many local and foreign creditors would thus be defeated by the resulting ridiculously low payments into Court of purchase prices<sup>4</sup>.

3.5 These views have been echoed in other judgments of courts in many jurisdictions but it is submitted that the above extracts are sufficient evidence of the effect of the non-recognition of judicial sales on efficient maritime transportation, the development of global trade and the world economy.

3.6 In order for the recognition of foreign judicial ship sales to be uniformly accepted by way of an international instrument, the intervention of the IMO in co-ordinating with other international bodies who have a mutual interest in such an instrument will be of considerable benefit to the international maritime community.

3.7 The IMO has stated that its highest priority is the safety of human life at sea with a particular focus on eliminating shipping that fails to meet and maintain technical, operational and safety management standards. As a high level action in this regard, the IMO intends

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<sup>1</sup> The Associate Chief Justice Noel in *Vrac Mar Inc. v. Demetries Karamanlis et al* [1972] FC 430 at p434 (Canada)

<sup>2</sup> (1988) LMLN 240, being a judgment of the Federal Court of Canada

<sup>3</sup> At page 11 of the judgment

<sup>4</sup> At page 12 of the judgment

keeping under review and supporting flag, and Port State implementation for enhancing and monitoring compliance.

3.8 Whilst national vessel registries may reflect the registered ownership of vessels, many registries may not, for various policy reasons, follow changes in the ownership of ships. Whilst ownership identity is nonetheless an important function of a ships' registry, the primary function of a register is to give a vessel "nationality". A vessel acquires thereby the privileges, protections and the burdens of vessels operating under allegiance to the sovereign.

3.9 It is submitted that the IMO has an interest in the efficient administration of ships' registries. The de-registration and re-registration from and into ships' registries of ships sold by judicial sale would add support both to the IMO strategic direction and to the proposed high level action.

3.10 While there has been no exhaustive compilation of data on the number of ships sold by way of judicial sale, the data from four significant maritime jurisdictions in Asia (Republic of Korea, China, Singapore and Japan) shows that, during the period 2010–2014, more than 480 ships were sold by way of judicial sale per year in these countries.

3.11 It follows that the number of ship sales that would benefit from the certainty provided by the draft convention would run to thousands of ships a year. It is submitted that this information, alone, establishes a compelling need for such an international instrument.

3.12 The courts have also noted a compelling need for an international regime dealing with the recognition of judicial sales of ships as set out in the aforementioned extracts from the judgment in the "*Galaxias*".

3.13 In addition, in the English case "*Acrux*"<sup>5</sup> (a summary of which is set out in annex 2) Mr Justice Hewson confirmed that Courts must recognise:

"proper sales by competent Courts of Admiralty, or prize, abroad – it is part of the comity of nations as well as a contribution to the general well-being of international maritime trade"<sup>6</sup>.

3.14 Whilst many judicial sales proceed as intended, problems still arise, some of which become the subject matter of further lengthy and costly judicial intervention.

3.15 There are a number of reported decisions where various problems are encountered. Summaries of the following cases that reflect the global nature of the problem are set out in annex 2: The "*Acrux*"<sup>7</sup> (England), the "*Galaxias*"<sup>8</sup> (Canada), the "*Great Eagle*"<sup>9</sup> (South Africa), the "*Union*"<sup>10</sup> (China), the "*Katerina*"<sup>11</sup> (The Netherlands), the "*Ahmet Bay*"<sup>12</sup> (USA) and the "*Sam Dragon*"<sup>13</sup> (Ireland).

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<sup>5</sup> [1962] Vol.1 Lloyds Law Reports at p405

<sup>6</sup> At p409

<sup>7</sup> [1961] 1 Lloyds Report at p405

<sup>8</sup> [1988] LMLN No. 240 at p2

<sup>9</sup> [1994] 1 SA 65(c)

<sup>10</sup> [2005] Jin Hai Fa Shang Chu Zi No. 401 – Judgment of the Tianjin Maritime Court

<sup>11</sup> [KG04/912P], LJN: DB 4789

<sup>12</sup> 623 F.SUP.2d635

<sup>13</sup> [2012] JEHC 240

3.16 If the proposed draft convention had been in force and ratified by the countries concerned, then in all probability the disputes which formed the subject matter of these cases would not have arisen and there would have been a very considerable saving of legal costs in the greater interests of the maritime industry as a whole.

3.17 Even where problems do not become the subject of further judicial involvement, the commercial and legal costs incurred in dealing with these issues are considerable, and the delays and interruptions to the owner's rights to trade the vessel severely interrupted. In most circumstances, the innocent owner is faced with a ship that has been arrested by a claimant.

3.18 As was recognised by Mr Justice Didcott (in an arrest case, not involving a judicial sale) in the South African case of the *mv Paz*<sup>14</sup> (a summary of which is set out in annex 2): "It is a serious business to attach a ship. To stop or delay its departure from one of our ports, to interrupt its voyage for longer than the period it was due to remain, can have and usually has consequences which are commercially damaging to its owner or charterer, not to mention those who are relying upon its arrival at other ports to load or discharge cargo."

3.19 In certain jurisdictions (such as China) the ship registration authorities will not accept foreign court documents as effective documents for the registration and de-registration of ships.

3.20 The proposal for approval of the final text of the draft convention was made by the China Maritime Law Association at the CMI Assembly in Hamburg in 2014. The proposal was supported by 24 acceptances with two abstentions and no vote against. The 24 acceptances comprise the National Maritime Law Associations of Argentina, Australia, Belgium, Canada, China, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Malta, the Netherlands, New Zealand, Nigeria, Norway, Republic of Korea, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States. The two abstentions were the National Maritime Law Associations of Brazil and Poland.

3.21 The CMI, heeding the concerns of various National Maritime Law Associations, recognized that the needs of the maritime industry and ship finance required that the judicial sale of ships is maintained as an effective way of securing and enforcing maritime claims and the enforcement of judgments or arbitral awards or other enforceable documents against the owners of ships.

#### **4 Analysis of the issue**

4.1 Any uncertainty for the prospective purchaser regarding the international recognition of a foreign judicial sale of a ship and the deletion or transfer of registry may have an adverse effect upon the price realised by a ship sold under judicial sale to the detriment of interested parties and the maritime industry as a whole.

4.2 Necessary and sufficient protection should be provided to purchasers of ships at judicial sales by limiting the remedies available to interested parties to challenge the validity of the judicial sale and the subsequent transfer of the ownership in the ship.

4.3 It is important to highlight the important legal principle that flows from a judicial sale that once a ship is sold by way of a judicial sale, the ship should, with only very limited exceptions no longer be subject to arrest for any claim arising prior to its judicial sale.

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<sup>14</sup> 1984 (3) 261 (D)

4.4 The objective of the recognition of a judicial sale of a ship requires that, to the extent possible, uniform rules are adopted with regard to the notice of the judicial sale, the legal effects of that sale and de-registration or registration of the ship.

4.5 These then were the issues that the draft convention, the text of which is set out in annex 1, sought to address, as follows:

- (1) As the draft convention was to focus on the recognition of judicial sales, the structure of the instrument was, initially, modelled on the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958*.
- (2) **Article 1** provides a list of definitions which has proved most useful in keeping the balance of the articles concise. Care has been taken to align definitions with those adopted by other conventions, in particular the *International Convention on Maritime Liens and Mortgages, 1993*.
- (3) **Article 2** provides that the convention shall apply to the conditions in which a judicial sale taking place in one State shall be sufficient for recognition in another.
- (4) **Article 3** sets out the parties to whom notice of the pending judicial sale must be given. It also requires such notice to be given by the competent authority in the State of the judicial sale. The article sets out what information should be set out in the notice. In all other respects, the notice is to be given in accordance with the law of the State of the judicial sale.
- (5) **Article 4** determines the effect of a judicial sale. The basic concept being that any title to and rights and interests in the ship that is the subject of the judicial sale shall be extinguished and any mortgage or similar charge will cease to attach to the ship and clean title to the ship will be acquired by the purchaser. The sale will not, however, extinguish any personal rights that a claimant may have against the owner or any other person personally liable to the creditor (to the extent that the debt has not been extinguished by the proceeds of the sale of the ship).
- (6) **Article 5** provides for the minimum content and mechanics of issuing a certificate of judicial sale by the competent authority. This certificate confirms that the ship has been sold in accordance with the laws of the State and the provisions of the convention. The certificate is to be issued substantially in the form of a model certificate annexed to the convention. In the absence of proof of circumstances referred to in article 8, the certificate shall be regarded, in terms of article 7, as conclusive evidence that the judicial sale has taken place and has the effect provided for in article 4.
- (7) **Article 6** provides that, against production of the article 5 certificate, the registry where the ship was registered prior to the judicial sale shall delete all mortgages or similar charges and either register the ship in the name of the new purchaser, or delete the ship from that register and issue a certificate of deregistration so that the ship can be registered elsewhere. Where the ship was on bareboat charter, and was flying the flag of a state of bareboat charter registration, then the ship shall be deleted from that registry against production of the certificate.

- (8) **Article 7** provides that subject to article 8, the court of a State party shall, on the application of a purchaser, recognize a judicial sale conducted in another State where that State has issued an article 5 certificate and regard that sale as having passed clean title to the purchaser, and that the ship was sold free of any mortgage or similar charge. If the ship sold by way of a judicial sale has been arrested, or its arrest is sought, for a claim that arose prior to the judicial sale, then the court shall dismiss or set aside the arrest, or reject any application for the ships arrest. The only exception is if the arresting party is an "interested person" (defined as the pre-sale owner or the holder of certain registered charges) and is able to show that circumstances exist that bring that persons case with the parameters of article 8.
- (9) **Article 8** sets out the circumstances in which the recognition of a judicial sale will be suspended or refused at the request of the interested person. The sale will not be recognized if it is shown that the ship was not physically within the jurisdiction of the State where the judicial sale took place. Recognition will be suspended where the sale is being challenged in the court of the State of judicial sale. Recognition will be refused where it can be shown that the sale has been nullified by a competent court of the State of judicial sale or where recognition would be manifestly contrary to public policy.
- (10) **Article 9** allows State parties to restrict the application of the convention to recognition of judicial sales conducted in State parties.
- (11) **Article 10** provides that nothing in the convention shall derogate from any other basis for the recognition of judicial sales under any other bi-lateral or multi-lateral convention, instrument, agreement or principle of comity.

## 5 Analysis of the implications

5.1 If an international convention can prevent ships from being arrested unnecessarily, and international trade and maritime commerce from being disrupted then, it is submitted, a compelling need for such an instrument is clearly made out. Further examples, of the compelling need for the proposed convention will appear from the submissions made in the further information provided below.

5.2 There is currently no suitable international instrument that recognises the judicial sale of ships and the manner in which a competent sale of a ship should be carried out.

5.3 As a result problems have arisen, and will continue to arise, with regard to the arrest, attachment or detention of ships by debtors with claims arising prior to the judicial sale.

5.4 It is not considered that the proposal will have any major implications on cost to the maritime industry. Almost all jurisdictions already require some form of certification of a judicial sale, so this is unlikely to present an additional, or significant additional, burden on either the purchaser or the maritime administration.

5.5 The Checklist for identifying administrative requirements and burdens as set out in annex 4 of the *Guidelines on the Organization and Method of Work of the Legal Committee* (LEG.1/Circ.7) has been completed and is set out in annex 3 to this document.

## 6 Benefits

6.1 The recognition of foreign judicial sales will create certainty to innocent purchasers that they have clean title and can trade the vessel without disruption from debts that arose prior to judicial sale. Purchasers will be able to de-flag ships from the erstwhile owner's registry and re-flag them in a registry of their choice.

6.2 The innocent purchaser will be able to take title to its vessel secure in the knowledge that the validity of the judicial sale will not be challenged.

## **7 Industry standard**

7.1 There are no applicable industry standards. Three existing conventions bear mention, however.

7.2 The *International Convention on Maritime Liens and Mortgages, 1993* has not been successful as it contains controversial provisions which do not solve the problems of the recognition of foreign judicial sales, and the wording with respect to recognition is more in the nature of denying recognition, rather than granting recognition of the judicial sale. However, wherever possible, the draft convention has been prepared so that its provisions do not conflict with those set out in the *Maritime Liens and Mortgages Convention*.

7.3 Whilst the *International Convention Relating to the Arrest of Sea-going Ships, 1952* seeks to regulate the claims that can be enforced by the arrest of a vessel, it does not provide for the judicial sale of a ship.

7.4 The *International Convention on the Arrest of Ships, 1999* mentions the judicial or forced sale of ships, but only in the context of its article 3.3, allowing, as an exception to the general rule, the arrest of a ship owned by a person not liable for the claim.

## **8 Output**

### **8.1 Specific**

The draft convention addresses the specific issues and problems that had been encountered due to the non-recognition of foreign judicial sales.

### **8.2 Measureable**

The output is measurable with a view to the number of ratifications the new convention may achieve and hence, the number of judicial sales that will be covered by the convention.

### **8.3 Achievable**

The draft convention has already been prepared by the CMI through the considerable contribution of numerous National Maritime Law Associations and the convention has the sponsorship of two countries, 24 National Maritime Law Associations (this figure is likely to increase) and the CMI and it is reasonable to expect that, with the assistance of the IMO, it will be acceptable to a large number of countries.

### **8.4 Realistic**

Bearing in mind the support given to the draft convention thus far, it is submitted that the general acceptance of the draft convention is a realistic outcome.

### **8.5 Time-bound**

The development of the convention is time-bound and it will have specific entry into force conditions.

**9 Priority/urgency**

9.1 Issues arising in respect of the non-recognition of judicial sales are ongoing. Given the current depressed state of the shipping market, judicial sales are likely to increase over the foreseeable future.

9.2 It is therefore proposed that the development of the draft convention is added as a new output to the agenda of the Legal Committee.

**Action requested of the Legal Committee**

10 The Committee is invited to consider the proposal in this document and agree to add a new output to develop a new instrument on foreign judicial sales of ships and their recognition, and to take action as appropriate

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## ANNEX 2

### List of Case Summaries\*

- 1 The "*Acrux*"<sup>1</sup> (United Kingdom) (1962)
- 2 The "*Norsland*"<sup>2</sup> (Canada) (1972)
- 3 The "*Paz*"<sup>3</sup> (South Africa) (1984)
- 4 The "*Galaxias*"<sup>4</sup> (Canada) (1988)
- 5 The "*Great Eagle*"<sup>5</sup> (South Africa) (1991)
- 6 The "*Katerina*"<sup>6</sup> (The Netherlands) (2004)
- 7 The "*Union*"<sup>7</sup> (China) (2006)
- 8 The "*Ahmet Bey*"<sup>8</sup> (United States) (2009)
- 9 The "*Sam Dragon*"<sup>9</sup> (Ireland) (2012)

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\* For full copy of the report or memorandum of these cases, please contact Henry Hai Li at [henryhai@henrylaw.cn](mailto:henryhai@henrylaw.cn) or Andrew Robinson at [Andrew.Robinson@nortonrosefulbright.com](mailto:Andrew.Robinson@nortonrosefulbright.com)

<sup>1</sup> [1961] 1 Lloyd's Reports at p.405

<sup>2</sup> 1972 CarswellNat 18, FC 430

<sup>3</sup> 1984 (3) SA 261 (N)

<sup>4</sup> [1988] LMLN No.240 at p.2

<sup>5</sup> 1994 (1) SA 65 (C)

<sup>6</sup> 2004 [KG04/912P], LJM:BB 4789, Schip & Schade 2007, 108

<sup>7</sup> [2005] Jin Hai Fa Shang Chu Zi No. 401 – Judgment of the Tianjin Maritime Court

<sup>8</sup> 2009 Civil Action No. 07-3518, United States District Court, E.D. Pennsylvania

<sup>9</sup> 2012 JEHC 240



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

On 16 December 1960, in a suit commenced by a French company for necessities, the Italian steamship *Acrux* owned by an Italian company was arrested in the United Kingdom of Great Britain and Northern Ireland. 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. 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 were 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 a certificate of deletion from the 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 was 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 no report was made as to whether 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.

In this case, Mr. Justice Hewson stated:

*"It would be intolerable, inequitable and an affront to the Court if any party who invoked the process of this Court and received its aid and, by implication, consented to the sale to an innocent purchaser, would thereafter proceed or was able to proceed elsewhere against the ship under her new and innocent ownership. This Court recognises proper sales by competent Courts of Admiralty, or prize, abroad – it is part of the comity of nations as well as a contribution to the general well-being of international maritime trade"<sup>10</sup>.*

**2 The Norsland - 1972 CarswellNat 18, FC 430**

In a motion filed with the Federal Court of Canada – Trial Division (the "Court") by a company called Vrac Mar Inc. (the "Suppliant") being the successful bidder for the ship M/V *Norsland* in a court sale dated 18 August 1971, under an order made by the Court on 18 August 1971, extended by a further order on 13 September 1971, the Suppliant asked the Court to make an order to allow subrogation of rights in its favour for the sum of \$3,943.95 paid to the Government of Panama holding an alleged maritime lien on the ship for arrears of certain taxes incurred in 1969, 1970 and 1971.

The order for sale of the ship *Norsland* made by the Court provided that sale of the ship should be as follows:

*"That the basis of the sale of the ship Norsland shall be as is, where is, as she now lies afloat at Longue Pointe, particulars not guaranteed, free and clear of all liens, charges, mortgages, encumbrances and claims and with a clean bill of sale."*

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<sup>10</sup> (1961) 1 Lloyd's Reports at p.409

The Suppliant contended that when it paid a price of \$111,000 for the ship, it was guaranteed that it would receive ownership of the latter and the said ship would be free of any encumbrance or maritime or other lien. It stated, however, that unfortunately the said ship was not free of any encumbrance, since in order to have the ship registered with the Canadian Ministry of Transport, it had to carry out certain formalities called "Proof surrender Panama documentation" and furnish proof that the *Norsland's* register was closed. Whereas, the Government of Panama refused to close the *Norsland's* register as long as the abovementioned arrears of taxes were unpaid. The Suppliant stated that it was accordingly obliged to incur considerable expenses and pay certain sums of money in order to have the ship registered in Canada. The said \$3,943.95 paid to the Republic of Panama through the legal firm Lette, Marcotte, Biron and Sutto was one of the sums paid by the Suppliant.

The Court allowed subrogation of rights in the Suppliant's favour for the amount of money paid to the Republic of Panama, but subject to the apportionment and priority of these amounts, as well as entitlement, being determined in court at the final decision on claims and their priority.

In the order, the court stated:

*"... the Republic of Panama, after filing a caveat for \$2,585.15, refuses to comply with the proceedings for sale of this ship, and observe the order of this Court giving the purchaser a clear title. I do not for the moment wish to characterize this action by that country, I would say nevertheless that the refusal to comply with a judgment of this Court after filing a claim, in addition to being an affront to a Canadian court, represents a refusal by that country to abide by the decisions of a court in another country, and an exception to a rule honored by every nation in the world. Indeed, if other countries, or other debtors, decided to follow this bad example, it would create confusion in an area which can be effectively controlled only with the good faith of all seafaring nations."<sup>11</sup>*

### 3      **The Paz** – 1984 (3) SA 261 (N)

A Nigerian company applied for arrest of the ship *Paz*, which was registered in Panama and presumably owned by a Panamanian company. The applicant's claim against the ship related to loss of or damage to cargo conveyed from Antwerp to Lagos almost five years previously. Litigation over the claim was pending in Hong Kong, China, where an action *in rem* had been instituted in the High Court. Because the ship was due to call at Durban in order to refuel, the applicant applied as a matter of urgency for an order to be issued by a court in South Africa for the arrest of the ship so as to provide it with security for the judgment which it hoped it would one day be awarded in Hong Kong, China.

Mr. Justice Didcott of the Natal Provincial Division, a single judge hearing the matter in the first instance, considered that the arrest of the ship raised an important question of judicial policy, namely whether or not that Court should, as he put it, allow itself to be "transformed into some sort of judicial Liberia or Panama", to be "turned into a Court of convenience for the wandering litigants of the world".

On 23 March 1984, a judgment was issued by the Court and the application for arrest was dismissed.

It was recognized by Mr. Justice Didcott that:

*"It is a serious business to attach a ship. To stop or delay its departure from one of our ports, to interrupt its voyage for longer than the period it was due to remain, can have*

<sup>11</sup> 1972 CarswellNat 18, FC 430



*and usually has consequences which are commercially damaging to its owner or charterer, not to mention those who are relying upon its arrival at other ports to load or discharge cargo.*<sup>12</sup>

#### 4 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. Subsequently, 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". Whereafter, 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 Sheriff 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.

Mr. Justice Rouleau held as follows:

*"The purchaser will take free and clear of all encumbrances according to the laws of Canada and although it is clear that Canadian Courts desire and expect that the Courts and Governments of other nations will respect its orders and judgments, particularly in the area of maritime law, this is not an area over which the Federal Court exercises control, nor is it appropriate that it attempt to do so".*

In addition, Mr. Justice Rouleau made the following pertinent comment regarding the need for international intervention:

*"I would like to add ... that in order to promote the free flow of maritime traffic, countries have, generally speaking, agreed to apply a uniform set of admiralty rules and laws. This does not, however, prevent any country from legally completely ignoring or setting aside any normally accepted practice or any law which is universally recognised in admiralty matters or even a rule of law which that country might previously have adopted by treaty. This is precisely what territorial jurisdiction means, and, until there exists some world authority with a superior globally enforceable overriding jurisdiction this is what we all must live with".*<sup>13</sup>

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<sup>12</sup> 1984 (3) SA 261 (N)

<sup>13</sup> At page 11 of the judgment

In commenting on judicial orders for the sales of ships that did not ensure the passing of "clean" title, the Judge stated:

*"However, admiralty lawyers and all lay people in the shipping world, involved in any way in the purchase and sale of ships, will invariably feel that this would greatly reduce the amounts which can be obtained from court sales of vessels and render some ships completely unsalable. The legitimate claims of many Canadian and foreign creditors would thus be defeated by the resulting ridiculously low payments into Court of purchase prices".<sup>14</sup>*

## 5 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 m.v. *Great Eagle* at Saldanha Bay, South Africa. The main claim was for a *declarator* that the Claimant was owner of the ship and entitled to its possession, although the ship had been sold by a court in Qingdao, China. The Claimant was therefore challenging the validity of the judicial sale in China. The alternative claim, on the premise that the Claimant was not the owner and that the owner was liable to the Claimant *in personam*, was for the recovery of damages in the amount of \$4.4 million arising from the concerted fraudulent actions of a number of parties which resulted in the Claimant being dispossessed of the ship at Qingdao, China, and the Respondent becoming its current registered owner.

It was accepted by the Respondent that up to 30 May 1991 the Claimant was the owner and under his ownership the ship was named *Mnimsyni*. However, on that date the ship was auctioned by the Qingdao Maritime Court, China, and, as the purchaser of the ship under the judicial sale, the Respondent became the owner of the ship. 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 vindicatory claim; (2) the Claimant had no *prima facie* case justifying the action and the accompanying arrest; and (3) the Court was not the appropriate forum for the matter to be heard and jurisdiction should be declined in terms of the Act.

It was concluded by the Court that (1) where a claimant seeks to vindicate a ship to which it claims ownership, the Act empowers him to arrest and take proceedings against it *in rem*. It followed that the Respondent's first ground failed; and (2) the Claimant had failed to make out a *prima facie* case in respect of the cause of the action, which meant the second ground on which the Respondent had based his application was successful. Being so, the court found it unnecessary to deal with the third ground, namely the *forum non conveniens* point. It was ordered by the Court *inter alia* that the ship be released from arrest and that the Claimant's action was 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 was advised that it has a *prima facie* case against the Respondent, i.e. the purchaser at the judicial sale, the appropriate forum to have such case established is the relevant Chinese Court, and not a South African one.

<sup>14</sup> At page 12 of the judgment

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

<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



**6 The *Katerina* - Schip & Schade 2007, 108: Court of Amsterdam, 7 May 2004, No. KG04/912P**

In 2004, Eta Petrol Akaryakit Ve Nakliyatı A.S., a Turkish company (the "ETA"), effected conservatory arrest by the Court of Amsterdam of the ship *Katerina* on the ground that, although in 2003 this ship, then named *Hidir Selek*, had been judicially sold in China at the application of a bank holding a mortgage on the ship, the judicial sale did not proceed normally and honestly. Therefore, the ownership of the ship never passed to any other person, thus ETA was still the owner of the ship. On the other hand, Esquire Management Co. ("Esquire"), the registered owner of the ship *Katerina* at the time of the arrest applied to the court to lift the arrest effected by ETA.

The Court issued a judgment holding that the arrest effected by ETA should be lifted, and the judgment was issued on the basis of the following facts:

- a. On 5 January 1996, ETA and the Hamburgische LandesBank (presently: HSH NordBank A.G., the "Bank") entered into a loan agreement for \$13,500,000 for the purchase by ETA of the ship *Hidir Selek*. Clause 5 of the loan agreement provided that ETA shall register the ship in the ship's register of Istanbul, Turkey. In clause 12 it was provided that German law is the applicable law and that the submission to a certain jurisdiction shall not (and shall not be construed so as to) limit the right of the Bank to take proceedings against the borrower in whatever jurisdiction shall the Bank deemed fit.
- b. On 26 March 1996, ETA and the Bank concluded a mortgage agreement in connection with the abovementioned loan. Clause 17 (a) provided that this mortgage shall be construed and enforceable in accordance with the laws of the Republic of Turkey.
- c. After obtaining an order for arrest on 7 June 2003 from the maritime court in Tjianjin, China, on 8 June 2003 the Bank effected an arrest of the ship *Hidir Selek* for arrears in the repayment of the loan. On 29 July 2003, the court in Tianjin ordered the judicial sale of the ship. On 21 August 2003 the Tianjin court published a notice with regard to the judicial sale of the ship.
- d. In Lloyd's List of 6 October 2003, ETA published a statement with the following contents:  
"WARNING  
To the shipping world and to the public about the illegitimate auction of M/V *Hidir Selek*."
- e. On 9 October 2003, the judicial sale at Tianjin took place, whereby sixteen bidders were present. The ship was purchased for \$6,840,000 by First Shipping Limited. Subsequently, First Shipping Limited sold the ship on for the same amount to Esquire. On 22 October 2003, the Tianjin court issued three documents with regard to the judicial sale of the ship, i.e. a certificate of transference of ownership of Turkish-registered M/V *Hidir Selek*, a civil ruling ((2003) HSCZ no. 343-12) ordering the release of the vessel and an "order of release of ship" (HFSCZ no. 343-13). On 23 October 2003, the ship was transferred to Esquire.
- f. On 24 October 2003, the ship, renamed *Katerina*, was entered into the ship's register of the Marshall Islands in the name of *Esquire*. The ship *Katerina* was burdened with two ship mortgages in favour of the Bank.
- g. In February 2004, ETA arrested the ship *Katerina* in Singapore. In this matter summary proceedings took place. In a judgment dated 16 March 2004 the Singapore court issued

an "Order of Court", to the effect that the arrest be lifted, and that the Plaintiffs [ETA] do pay the Defendants damages for wrongful arrest of the vessel *Katerina*, to be assessed by the Registrar and that ETA shall pay the legal costs in the amount of \$5,000 to Esquire.

- h. On 19 April 2004, ETA obtained an order from the injunction judge of the court of Amsterdam for effecting the conservatory arrest of the ship *Katerina*, but it had done nothing with this order for arrest.
- i. On 26 April 2004, ETA requested and obtained an 'Einstweilige Verfügung' (provisional measure) from the Amtsgericht Brake, Germany. The court bailiff handed down the court measure on board the ship. However, the ship *Katerina* left the German port.
- j. After obtaining the order for arrest from the injunction judge at Amsterdam, on 27 April 2004 ETA effected a conservatory arrest of the ship *Katerina* to the detriment of Esquire.
- k. On 5 May 2004, the Turkish court issued an "injunction order", whereby (amongst other things) it was provided that the ship was under arrest and that no changes can be effected onto its registration.

In the judgment, it is held by the court, inter alia, that:

“ ...  
*The above leads to the conclusion that the auction has taken place in China according to Chinese law, the consequences of this auction with regard to the ownership of the ship are governed by Chinese law. The parties agree that according to Chinese law ownership has passed to First Shipping Limited and that this company has resold and delivered the ship to Esquire. Esquire has therefore acquired the ownership of the ship, and therefore the conservatory arrest applied for by ETA was effected wrongfully. This arrest must therefore be lifted. This is not effected by the fact that Esquire having ignored an 'Einstweilige Verfügung' (provisional measure) of the German court has let the ship leave the port of Brake, since this is a matter between the German judicial authorities and Esquire and does not affect the ownership of the ship.*”

**7 The Union - 2005 Jin Hai Fa Shang Chu Zi No. 401.**

On 24 June 2005, the ship, *Union*, which was registered in Belize was arrested by Tianjin Maritime Court of the People's Republic of China at the application of a French bank based in Paris, for enforcement of a mortgage on the ship *Phoenix*, which was the former name of the ship then 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 Saint Vincent and the Grenadines, and was further registered in the Russian Federation later in November 1999 when the ship was bareboat chartered to a Russian company. In order to recover from the borrower the outstanding balance of the loan which was in the sum of \$2 million, a judgment had been obtained in the mortgagee's favour from the Commercial Court of Paris in September 2003. However, the judgment was 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* (whose current name was *Union*), should be recognized by the Court and enforceable on the ship irrespective of the change of her name and registration. In opposition, 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 contended 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") on 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 was 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 was ascertained by the Maritime Court that after the sale of the ship by the DPRK Court the registration of the ship and the mortgage in Saint Vincent and the Grenadines was not deleted.

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

One of the issues in this case was whether or not the order of sale made by the DPRK Court should be recognized as an effective court order, thus accepting the judicial sale as valid and the prior mortgage extinguished.

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 were all extinguished given the fact that the registration of the ship and the mortgage in Saint Vincent and the Grenadines was not deleted; (2) to ascertain the fact that the ship had once been sold by the DPRK Court is just a matter of fact being investigated by this court, that does not involve any recognition or enforcement by this 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 Saint Vincent and the Grenadines. Based on these grounds, the claims of the mortgagee were dismissed by the Maritime Court.

Perhaps, it is worth mentioning that the appeal by the mortgagee was also rejected by the High Court of Tianjin<sup>18</sup>.

**8**        **The *Ahmet Bey*** – 623 F. Supp. 2d 635 *Goldfish Shipping, S.A. v. HSH Nordbank AG*. Civil Action No. 07-3518. United States District Court, E.D. Pennsylvania. April 1, 2009

In early 2003, *Odin Denizcilik, A.S.* (the "Odin"), a company incorporated in Turkey, was the owner of the ship *Ahmet Bey* (the "Ship") flying a Turkish flag, HSH Nordbank AG (the "Nordbank") held a first mortgage on the ship. *Odin* defaulted on the mortgage, Nordbank had the ship arrested in the Port of Philadelphia, and the Marshal sold the ship to *Goldfish Shipping, S.A.* (the "Goldfish") in a judicial mortgage foreclosure sale.

After the foreclosure sale, *Odin* had the ship arrested in Barcelona, Spain and Ravenna, Italy, claiming continued ownership of the ship.

On August 24 2007, *Goldfish* commenced the instant action before the U.S. District Court against Nordbank seeking damages associated with *Odin's* two seizures of the ship. The crux of the First Amended Complaint filed by *Goldfish* was that Nordbank had failed to deliver the ship to *Goldfish* "free and clear" of *Odin's* claims to the ship. *Goldfish* asserted that *Odin*

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

remained the registered owner of the ship on the Turkish Registry of Shipping, and that Nordbank should therefore be liable for the damages that Goldfish suffered on account of Odin's arrests of the ship in Barcelona and Ravina.

It was held by the Court that all of Goldfish's claims failed because they rested on the premise that the ship had not been sold "free and clear of all liens, claims and encumbrances." The Court explained that Goldfish's reliance on this premise was fatal to its claims because the ship had been sold pursuant to the Ship Mortgage Act, which, by its terms, mandates that the ship had been "sold free of all ... claims."

As regards the argument put forward by Goldfish that Nordbank violated some other duty, either in contract or in tort, to either delete the ship from the Turkish Registry or unconditionally consent to the ship's deletion from the registry in order to extinguish that "indicia of ownership", the Court found, inter alia, as a matter of law that the Marshal was the seller of the ship, that title to the ship was transferred directly from Odin to Goldfish, and that no duties attached to Nordbank on account of its alleged status as the "seller". Goldfish had also provided no authority that supported its assertion that Nordbank's status as "beneficiary of or" initiator of the foreclosure sale gave rise to a legally enforceable duty to delete, or to consent to the deletion of, the ship from the Turkish Registry.

Perhaps, it is interesting to note that in another action<sup>19</sup> also in relation to this ship, the court concluded:

*"...We have been involved in litigation with these parties since 2003, when Nordbank first sought to have the vessel arrested. We entertained Odin's challenge to the arrest, both ordered and confirmed the Marshal's sale of the vessel in order to satisfy Nordbank's lien, ordered that the Marshal deliver title to the vessel to Goldfish 'free and clear of all claims, liens, or encumbrances,' and oversaw the distribution of the proceeds. We also entertained and resolved an action that Goldfish filed against Odin for damages it suffered on account of Odin's improper arrest of the vessel in Barcelona, and Goldfish subsequently received compensation for those damages from the proceeds of the re-sale."*

## 9      **The Sam Dragon** – 2012 IEHC 240

The plaintiff in this case was SPV Sam Dragon Inc., a company incorporated under the laws of Panama and the owner of the vessel *Sam Dragon*, formerly named the *Pretty Flourish* ("Vessel"), which was the subject of a judicial sale in Belgium. The defendant was GE Transportation Finance (Ireland) Limited, a company incorporated in Ireland, which provided a loan facility to a company of the Republic of Korea called Samsun Logix Corporation ("Samsun"), the shipowner of the vessel prior to the judicial sale. The defendant held a mortgage on the vessel as security for the loan facility to Samsun.

The plaintiff's claim in the Irish Courts in this action was brought as the purchaser of the vessel in the judicial sale, for damages and expenses incurred by it in registering the vessel on the Shipping Register of Hong Kong, China. The plaintiff claimed that additional charges and expenses arose as a result of the failure of the defendant to comply with the plaintiff's request to remove the entry of the mortgage from the Ship's Register in the Republic of Korea. It had always been the intention of the plaintiff to register the vessel in the Ship Registry of Hong Kong, China. However, full registration on the Shipping Register of Hong Kong, China can only be secured upon production of a Deletion Certificate from the vessel's former registry. The plaintiff also claimed that it was required to seek registration of the vessel under a flag of

<sup>19</sup> 2008 WL 4809410. *Goldfish Shipping, S.A. v. HSH Nordbank AG*, Civil Action No. 07-3518. Nov. 3, 2008

convenience and that it had registered the vessel in Panama on a temporary basis and could not register the vessel in Hong Kong, China on a permanent basis until the entry in the Register of the Republic of Korea was finally deleted.

In order to determine whether the defendant had a legal liability, the court had to decide whether there was a legal duty on the mortgagee of a vessel to take affirmative steps to delete the entry of the mortgage on the ship's register in the circumstances where there has been a judicial sale in a country other than the country of the registration.

As the case involved parties from a number of countries and legal issues arising in several jurisdictions, this raised a question as to what law should apply. Does one law apply to the arrest proceedings in Belgium and another law apply to the questions surrounding the issue of removal of the entry of the mortgage from the ship's register in the Republic of Korea?

By the time the case concluded, it was agreed between the parties that Belgium law applied to the first issue. The remaining question was whether Belgium law or the law of the Republic of Korea applied to the second alleged wrongful act?

As to that issue the judge held that

*"Having considered the evidence, it seems to me that the country most connected with the alleged wrong arising out of the failure by the defendant to delete the entry of the mortgage from the Korean Register is [the Republic of] Korea, and that the consequences in other jurisdictions were 'indirect consequences' within the meaning of Article 4(1) of the Rome II Regulation. Accordingly, I hold that Korean law applies to this issue."*

After hearing evidence given by a number of expert witnesses from different jurisdictions, the judge further held that

*"I am satisfied that the defendant was not obliged to voluntarily delete the mortgage either before they received payment out of the proceeds of sale of the Vessel or otherwise." "Accordingly, the plaintiff's claim fails."<sup>20</sup>*

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<sup>20</sup>2012 IEHC 240

**ANNEX 3**

**CHECKLIST FOR IDENTIFYING ADMINISTRATIVE REQUIREMENTS AND BURDENS**

The checklist for identifying administrative requirements and burdens should be used when preparing the analysis of implications required of submissions of proposals for inclusion of unplanned outputs. For the purpose of this analysis, the terms administrative requirements and burdens are defined as in resolution A.1043(27), i.e. administrative requirements is defined as an obligation arising from future IMO mandatory instruments to provide or retain information or data, and administrative burdens is defined as those administrative requirements that are or have become unnecessary, disproportionate or even obsolete.

**Instructions:**

(A) If the answer to any of the questions below is **YES**, the Member State proposing an unplanned output should provide supporting details on whether the burdens are likely to involve start-up and/or ongoing cost. The Member State should also make a brief description of the requirement and, if possible, provide recommendations for further work (e.g. would it be possible to combine the activity with an existing requirement).

(B) If the proposal for the unplanned output does not contain such an activity, answer **NR** (Not required).

<p>1. Notification and reporting? Reporting certain events before or after the event has taken place, e.g. notification of voyage, statistical reporting for IMO Members, etc.</p>	<p>NR √</p>	<p>Yes <input type="checkbox"/> Start-up <input type="checkbox"/> Ongoing</p>
<p>Description: (if the answer is yes)</p>		
<p>2. Record keeping? Keeping statutory documents up to date, e.g. records of accidents, records of cargo, records of inspections, records of education, etc.</p>	<p>NR √</p>	<p>Yes <input type="checkbox"/> Start-up <input type="checkbox"/> Ongoing</p>
<p>Description: (if the answer is yes)</p>		
<p>3. Publication and documentation? Producing documents for third parties, e.g. warning signs, registration displays, publication of results of testing, etc.</p>	<p>NR √</p>	<p>Yes <input type="checkbox"/> Start-up <input type="checkbox"/> Ongoing</p>
<p>Description: (if the answer is yes)</p>		
<p>4. Permits or applications? Applying for and maintaining permission to operate, e.g. certificates, classification society costs, etc.</p>	<p>NR √</p>	<p>Yes <input type="checkbox"/> Start-up <input type="checkbox"/> Ongoing</p>
<p>Description: (if the answer is yes)</p>		
<p>5. Other identified burdens?</p>	<p>NR √</p>	<p>Yes</p>
<p>Description: (if the answer is yes)</p>		



## ANNEX 1

### **Draft International Convention on Foreign Judicial Sales of Ships and their Recognition**

(Known as the "Beijing Draft")

(Done at Beijing on 19 October 2012, amended at Dublin in 2013 and at Hamburg in 2014)

The States Parties to the present Convention,

RECOGNIZING that the needs of the maritime industry and ship finance require that the Judicial Sale of Ships is maintained as an effective way of securing and enforcing maritime claims and the enforcement of judgments or arbitral awards or other enforceable documents against the Owners of Ships;

CONCERNED that any uncertainty for the prospective Purchaser regarding the international Recognition of a Judicial Sale of a Ship and the deletion or transfer of registry may have an adverse effect upon the price realised by a Ship sold at a Judicial Sale to the detriment of interested parties;

CONVINCED that necessary and sufficient protection should be provided to Purchasers of Ships at Judicial Sales by limiting the remedies available to interested parties to challenge the validity of the Judicial Sale and the subsequent transfers of the ownership in the Ship;

CONSIDERING that once a Ship is sold by way of a Judicial Sale, the Ship should in principle no longer be subject to arrest for any claim arising prior to its Judicial Sale;

CONSIDERING further that the objective of Recognition of the Judicial Sale of Ships requires that, to the extent possible, uniform rules are adopted with regard to the notice to be given of the Judicial Sale, the legal effects of that sale and the de-registration or registration of the Ship.

HAVE AGREED as follows:

#### **Article 1 Definitions**

For the purposes of this Convention:

1. "Certificate" means the original duly issued document, or a certified copy thereof, as provided for in Article 5.
2. "Charge" includes any charge, Maritime Lien, lien, encumbrance, claim, arrest, attachment, right of retention or any other rights whatsoever and howsoever arising which may be asserted against the Ship.
3. "Clean Title" means a title free and clear of any Mortgage/Hypothèque or Charge unless assumed by any Purchaser.
4. "Competent Authority" means any Person, Court or authority empowered under the law of the State of Judicial Sale to sell or transfer or order to be sold or transferred, by a Judicial Sale, a Ship with Clean Title.

5. "Court" means any judicial body established under the law of the state in which it is located and empowered to determine the matters covered by this Convention.
6. "Day" means calendar day.
7. "Interested Person" means the Owner of a Ship immediately prior to its Judicial Sale or the holder of a registered Mortgage/Hypothèque or Registered Charge attached to the Ship immediately prior to its Judicial Sale.
8. "Judicial Sale" means any sale of a Ship by a Competent Authority by way of public auction or private treaty or any other appropriate ways provided for by the law of the State of Judicial Sale by which Clean Title to the Ship is acquired by the Purchaser and the proceeds of sale are made available to the creditors.
9. "Maritime Lien" means any claim recognized as a maritime lien or privilège maritime on a Ship by the law applicable in accordance with the private international law rules of the State of Judicial Sale.
10. "Mortgage/Hypothèque" means any mortgage or hypothèque effected on a Ship in the State of Registration and recognized as such by the law applicable in accordance with the private international law rules of the State of Judicial Sale.
11. "Owner" means any Person registered in the register of ships of the State of Registration as the owner of the Ship.
12. "Person" means any individual or partnership or any public or private body, whether corporate or not, including a state or any of its constituent subdivisions.
13. "Purchaser" means any Person who acquires ownership in a Ship or who is intended to acquire ownership in a Ship pursuant to a Judicial Sale.
14. "Recognition" means that the effect of the Judicial Sale of a Ship shall be accepted by a State party to be the same as it is in the State of Judicial Sale.
15. "Registered Charge" means any Charge entered in the registry of the Ship that is the subject of the Judicial Sale.
16. "Registrar" means the registrar or equivalent official in the State of Registration or the State of Bareboat Charter Registration, as the context requires.
17. "Ship" means any ship or other vessel capable of being an object of a Judicial Sale under the law of the State of Judicial Sale.
18. "State of Registration" means the state in whose register of ships ownership of a Ship is registered at the time of its Judicial Sale.
19. "State of Judicial Sale" means the state in which the Ship is sold by way of Judicial Sale.
20. "State of Bareboat Charter Registration" means the state which granted registration and the right to fly temporarily its flag to a Ship bareboat chartered-in by a charterer in the said state for the period of the relevant charter.

21. "Subsequent Purchaser" means any Person to whom ownership of a Ship has been transferred through a Purchaser.

22. "Unsatisfied Personal Obligation" means the amount of a creditor's claim against any Person personally liable on an obligation, which remains unpaid after application of such creditor's share of proceeds actually received following and as a result of a Judicial Sale.

## **Article 2 Scope of Application**

This Convention shall apply to the conditions in which a Judicial Sale taking place in one state shall be sufficient for recognition in another state.

## **Article 3 Notice of Judicial Sale**

1. Prior to a Judicial Sale, the following notices, where applicable, shall be given, in accordance with the law of the State of Judicial Sale, either by the Competent Authority in the State of Judicial Sale or by one or more parties to the proceedings resulting in such Judicial Sale, as the case may be, to:

(a) The Registrar of the Ship's register in the State of Registration;

(b) All holders of any registered Mortgage/Hypothèque or Registered Charge provided that these are recorded in a ship registry in a State of Registration which is open to public inspection, and that extracts from the register and copies of such instruments are obtainable from the registrar;

(c) All holders of any Maritime Lien, provided that the Competent Authority conducting the Judicial Sale has received notice of their respective claims; and

(d) The Owner of the Ship.

2. If the Ship subject to Judicial Sale is flying the flag of a State of Bareboat Charter Registration, the notice required by paragraph 1 of this Article shall also be given to the Registrar of the Ship's register in such State.

3. The notice required by paragraphs 1 and 2 of this Article shall be given at least 30 Days prior to the Judicial Sale and shall contain, as a minimum, the following information:

(a) The name of the Ship, the IMO number (if assigned) and the name of the Owner and the bareboat charterer (if any), as appearing in the registry records (if any) in the State of Registration (if any) and the State of Bareboat Charter Registration (if any);

(b) The time and place of the Judicial Sale; or if the time and place of the Judicial Sale cannot be determined with certainty, the approximate time and anticipated place of the Judicial Sale which shall be followed by additional notice of the actual time and place of the Judicial Sale when known but, in any event, not less than 7 Days prior to the Judicial Sale; and

(c) Such particulars concerning the Judicial Sale or the proceedings leading to the Judicial Sale as the Competent Authority conducting the proceedings shall determine are sufficient to protect the interests of Persons entitled to notice.

4. The notice specified in paragraph 3 of this Article shall be in writing, and given in such a way not to frustrate or significantly delay the proceedings concerning the Judicial Sale:

(a) either by sending it by registered mail or by courier or by any electronic or other appropriate means to the Persons as specified in paragraphs 1 and 2; and

(b) by press announcement published in the State of Judicial Sale and in other publications published or circulated elsewhere if required by the law of the State of Judicial Sale.

5. Nothing in this Article shall prevent a State Party from complying with any other international convention or instrument to which it is a party and to which it consented to be bound before the date of entry into force of the present Convention.

6. In determining the identity or address of any Person to whom notice is required to be given other parties and the Competent Authority may rely exclusively on information set forth in the register in the State of Registration and if applicable in the State of Bareboat Registration or as may be available pursuant to Article 3(1)(c).

7. Notice may be given under this Article by any method agreed to by a Person to whom notice is required to be given.

#### **Article 4 Effect of Judicial Sale**

1. Subject to:

(a) the Ship being physically within the jurisdiction of the State of Judicial Sale, at the time of the Judicial Sale; and

(b) the Judicial Sale having been conducted in accordance with the law of the State of Judicial Sale and the provisions of this Convention,

any title to and all rights and interests in the Ship existing prior to its Judicial Sale shall be extinguished and any Mortgage/Hypothèque or Charge, except as assumed by the Purchaser, shall cease to attach to the Ship and Clean Title to the Ship shall be acquired by the Purchaser.

2. Notwithstanding the provisions of the preceding paragraph, no Judicial Sale or deletion pursuant to paragraph 1 of Article 6 shall extinguish any rights including, without limitation, any claim for Unsatisfied Personal Obligation, except to the extent satisfied by the proceeds of the Judicial Sale.

#### **Article 5 Issuance of a Certificate of Judicial Sale**

1. When a Ship is sold by way of Judicial Sale and the conditions required by the law of the State of Judicial Sale and by this Convention have been met, the Competent Authority shall, at the request of the Purchaser, issue a Certificate to the Purchaser recording that

(a) the Ship has been sold to the Purchaser in accordance with the law of the said State and the provisions of this Convention free of any Mortgage/Hypothèque or Charge, except as assumed by the Purchaser; and

(b) any title to and all rights and interests existing in the Ship prior to its Judicial Sale are extinguished.

2. The Certificate shall be issued substantially in the form of the annexed model and shall contain the following minimum particulars:

- i. The State of Judicial Sale;
- ii. The name, address and, unless not available, the contact details of the Competent Authority issuing the Certificate;
- iii. The place and date when Clean Title was acquired by the Purchaser;
- iv. The name, IMO number, or distinctive number or letters, and port of registry of the Ship;
- v. The name, address or residence or principal place of business and contact details, if available, of the Owner(s);
- vi. The name, address or residence or principal place of business and contact details of the Purchaser;
- vii. Any Mortgage/Hypothèque or Charge assumed by the Purchaser;
- viii. The place and date of issuance of the Certificate; and
- ix. The signature, stamp or other confirmation of authenticity of the Certificate.

#### **Article 6 Deregistration and Registration of the Ship**

1. Upon production by a Purchaser or Subsequent Purchaser of a Certificate issued in accordance with Article 5, the Registrar of the Ship's registry where the Ship was registered prior to its Judicial Sale shall delete any registered Mortgage/Hypothèque or Registered Charge, except as assumed by the Purchaser, and either register the Ship in the name of the Purchaser or Subsequent Purchaser, or delete the Ship from the register and issue a certificate of deregistration for the purpose of new registration, as the Purchaser may direct.

2. If the Ship was flying the flag of a State of Bareboat Charter Registration at the time of the Judicial Sale, upon production by a Purchaser or Subsequent Purchaser of a Certificate issued in accordance with Article 5, the Registrar of the Ship's registry in such State shall delete the Ship from the register and issue a certificate to the effect that the permission for the Ship to register in and fly temporarily the flag of the State has been withdrawn.

3. If the Certificate referred to in Article 5 is not issued in an official language of the State in which the abovementioned register is located, the Registrar may request the Purchaser or Subsequent Purchaser to submit a duly certified translation of the Certificate into such language.

4. The Registrar may also request the Purchaser or Subsequent Purchaser to submit a duly certified copy of the said Certificate for its records.

#### **Article 7 Recognition of Judicial Sale**

1. Subject to the provisions of Article 8, the Court of a State Party shall, on the application of a Purchaser or Subsequent Purchaser, recognize a Judicial Sale conducted in any other state for which a Certificate has been issued in accordance with Article 5, as having the effect:

(a) that Clean Title has been acquired by the Purchaser and any title to and all the rights and interests in the Ship existing prior to its Judicial Sale have been extinguished; and

(b) that the Ship has been sold free of any Mortgage/Hypothèque or Charge, except as assumed by the Purchaser.

2. Where a Ship which was sold by way of a Judicial Sale is sought to be arrested or is arrested by order of a Court in a State Party for a claim that had arisen prior to the Judicial Sale, the Court shall dismiss, set aside or reject the application for arrest or release the Ship from arrest upon production by the Purchaser or Subsequent Purchaser of a Certificate issued in accordance with Article 5, unless the arresting party is an Interested Person and furnishes proof evidencing existence of any of the circumstances provided for in Article 8.

3. Where a Ship is sold by way of Judicial Sale in a state, any legal proceeding challenging the Judicial Sale shall be brought only before a competent Court of the State of Judicial Sale and no Court other than a competent Court of the State of Judicial Sale shall have jurisdiction to entertain any action challenging the Judicial Sale.

4. No Person other than an Interested Person shall be entitled to take any action challenging a Judicial Sale before a competent Court of the State of Judicial Sale, and no such competent Court shall exercise its jurisdiction over any claim challenging a Judicial Sale unless it is made by an Interested Person. No remedies shall be exercised either against the Ship the subject of the Judicial Sale or against any *bona fide* Purchaser or Subsequent Purchaser of that Ship.

5. In the absence of proof that a circumstance referred to in Article 8 exists, a Certificate issued in accordance with Article 5 shall constitute conclusive evidence that the Judicial Sale has taken place and has the effect provided for in Article 4, but shall not be conclusive evidence in any proceeding to establish the rights of any Person in any other respect.

#### **Article 8 Circumstances in which Recognition may be Suspended or Refused**

Recognition of a Judicial Sale may be suspended or refused only in the circumstances provided for in the following paragraphs:

1. Recognition of a Judicial Sale may be refused by a Court of a State Party, at the request of an Interested Person if that Interested Person furnishes to the Court proof that at the time of the Judicial Sale, the Ship was not physically within the jurisdiction of the State of Judicial Sale.

2. Recognition of a Judicial Sale may be

a) suspended by a Court of a State Party, at the request of an Interested Person, if that Interested Person furnishes to the Court proof that a legal proceeding pursuant to paragraph 3 of Article 7 has been commenced on notice to the Purchaser or Subsequent Purchaser and that the competent Court of the State of Judicial Sale has suspended the effect of the Judicial Sale; or

b) refused by a Court of a State Party, at the request of an Interested Person, if that Interested Person furnishes to the Court proof that the competent Court of the State of Judicial Sale in a

judgment or similar judicial document no longer subject to appeal has subsequently nullified the Judicial Sale and its effects, either after suspension or without suspension of the legal effect of the Judicial Sale.

3. Recognition of a Judicial Sale may also be refused if the Court in a State Party in which Recognition is sought finds that Recognition of the Judicial Sale would be manifestly contrary to the public policy of that State Party.

#### **Article 9 Reservation**

State parties may by reservation restrict application of this Convention to recognition of Judicial Sales conducted in State Parties.

#### **Article 10 Relations with other International Instruments**

Nothing in this Convention shall derogate from any other basis for the Recognition of Judicial Sales under any other bilateral or multilateral Convention, Instrument or agreement or principle of comity.

**[Final clauses in respect of signature, ratification, acceptance, approval, accession, denunciation, coming into force, language, amendment etc. shall be drafted later and separately.]**

Annex

**Certificate**

Issued in accordance with the provisions of Article 5 of the International Convention on Foreign Judicial Sales of Ships and their Recognition

This is to certify that the Ship described below has been sold by way of Judicial Sale and all conditions required by the law of the State of Judicial Sale and by the International Convention on Foreign Judicial Sales of Ships and their Recognition (the "Convention") have been met, and that Clean Title as defined by the Convention has been transferred to the named Purchaser and any title to and all rights and interests in the Ship existing prior to the Judicial Sale are extinguished and any Mortgage or Charge, except as assumed by the Purchaser, shall cease to attach to the Ship.

**1. State of Judicial Sale** .....

**2. Competent Authority issuing this Certificate**

2.1 Name. ....

2.2 Address. ....

2.3 Telephone/fax/email, if available. ....

2.4 Place and date Clean Title acquired by Purchaser .....

**3. Ship**

3.1 Name. ....

3.2 IMO number or Distinctive number or letters .....

3.3 Place of issuance of the distinctive number or letters. ....

3.4 Port of registry .....

**4. Owner(s)**

4.1 Name. ....

4.2 Address or residence or principal place of business. ....

4.3 Telephone/fax/email. ....

**5. Purchaser**

5.1 Name. ....

5.2 Address or residence or principal place of business. ....

5.3 Telephone/fax/email. ....

**6. Holder of the Assumed Mortgage/Hypothèque or Charge**

- 6.1 Name. ....
- 6.2 Address or residence or principal place of business. ....
- 6.3 Telephone/fax/email. ....
- 6.4 Maximum amount of each Mortgage/Hypothèque or Charge assumed by the Purchaser (if available) .....

At ....., On .....

(place)

(date)

.....  
Signature and/or stamp

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*Non-technical measures to promote quality shipping*

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vessels whose P&I risks are subsidized by premiums of better quality ships, or that use of punitive insurance premiums for poorer quality tonnage would be an effective non-technical measure to reduce serious accidents.

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*Conference documents*

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## JUDICIAL SALE OF SHIPS

- (1) **A Brief Discussion on Judicial Sale of Ships,**  
**by Henry Hai Li**

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## A BRIEF DISCUSSION ON JUDICIAL SALE OF SHIPS

HENRY HAI LI\*

### Introduction

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 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 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,

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The author would like to thank the well-known Hong Kong arbitrator, Philip Yang; the partner of Shepstone & Wylie, Shane Dwyer; the doctoral candidates of Dalian Maritime University, Wang Yanan and Zhang Zhiyong; and the law firm colleague, Sarah Zhu and Tina Liao, for their assistance and help to the author for the preparation of this paper.

<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.

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 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

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

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

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

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

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. Or, it is advisable that the international convention should contain a definition on "forced sale" or "judicial sale", whichever is used in the convention, so as to avoid any possible misunderstanding of the term.

### The "titles"

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 replied 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 hypothec 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

<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.

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

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. 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/hypothec 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/hypothec 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. 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 Colorado*", "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 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 following:

- (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;

<sup>9</sup> The "*Cerro Colorado*" (1993) 1 Lloyd's Rep. 58.

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

- (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 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

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

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

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

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. 471-  
(1962) Lloyd Rep. 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 a 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 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 *Great 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 the owner and under his ownership the ship was named *Mnimysni*, 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

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

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

(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 vindicatory 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.

#### 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 Russian 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

<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.

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 was 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>.

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.

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

## (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 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

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

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 the 1967 Convention has not yet come into effect, while the 1993 Convention although has come into effect on 5 September 2004 has not yet become a widely accepted international convention. 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 of ships 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 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.

<sup>20</sup> See the "*Acrux*" (1962) 1 Lloyd's Rep. 409.

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 the 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 ridded.

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 or seized in one country or another, and some of the arrested or seized 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, the 1967 Convention has not yet come into effect, while the 1993 Convention, although has come into effect on 5 September 2004, has not yet become a widely accepted 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 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.

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

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 discussion or debate on the issues including those identified 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.

### CHARTERER'S RIGHTS TO LIMIT LIABILITY

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# LLOYD'S LIST LAW REPORTS

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[PART 9

## ADMIRALTY DIVISION

Monday, Apr. 16, 1962

### THE "ACRUX"

Before Mr. Justice HEWSON

Admiralty Court—Appraisement and sale of ship by Admiralty Marshal—Title conferred by Court in proceedings *in rem*—Comity of nations—Maritime law.

Sale of steamship *Acrux* by Admiralty Marshal to satisfy Admiralty Court judgment in proceeding *in rem* by Italian mortgagees — Motion by mortgagees for judgment (in default of appearance) against proceeds of sale—Proceeds of sale less than sum claimed by mortgagees — Court informed by Admiralty Marshal that purchaser of *Acrux* was unable to secure permanent registration of vessel in desired country because he was unable to obtain certificate of deletion from Italian Register — Evidence that order for sale of Admiralty Court was not recognized in Italy and that, according to Italian law, mortgagees could proceed against ship in any country — Undertaking required from mortgagees by Court not to commence proceedings *in rem* or any similar proceedings abroad against *Acrux* in respect of this claim.

—Held, that title to *Acrux* was given to innocent purchaser; that if sum representing vessel was insufficient to satisfy all claims, that was no fault of Court and loss must be on creditors for advancing money against inadequate security; that mortgagees by claiming against fund approbated process of Court in effecting sale; that it would be inequitable if mortgagees were able to proceed against ship under her new ownership; that, accordingly, undertaking from mortgagees was required, although there was no evidence that mortgagees were

contemplating further proceedings; and that, the undertaking having been given, judgment would be entered for mortgagees.

Per HEWSON, J. (at p. 409): Were such a clean title as given by this Court to be challenged or disturbed, the innocent purchaser would be gravely prejudiced. Not only that, but as a general proposition the maritime interests of the world would suffer. . . .

It would be intolerable, inequitable and an affront to the Court if any party who invoked the process of this 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. This Court recognizes proper sales by competent Courts of Admiralty, or Prize, abroad—it is part of the comity of nations as well as a contribution to the general well-being of international maritime trade.

The following cases were referred to:  
*Castrique v. William Imrie and Another*, (1869) L.R. 4 H.L. 414;  
*Tremont*, (1841) 1 Wm. Rob. 163.

This was a motion by Banco di Sicilia, mortgagees, for judgment in default of appearance against the proceeds of the sale of the Italian steamship *Acrux*, which was sold by order of the Court in April, 1961, with priorities reserved.

Previous proceedings were reported in [1961] 1 Lloyd's Rep. 471.

The plaintiffs claimed the sum of £64,481 2s. 4d. against the proceeds of sale of the *Acrux*. They said that on May 2, 1961, the vessel was sold by order of the Court and the proceeds of such sale,

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The "Acrux"

amounting in all to £42,625 13s. 9d., were in Court. Up to the time of such sale the owners of the *Acrux* were *Acrux Compagnia di Navigazione Societa per Azioni* (hereinafter called the "former owners"), a company incorporated in accordance with the laws of Italy, and customers of the plaintiffs. By a contract in writing (hereinafter called "the deed of loan and first mortgage") made in Palermo and dated Dec. 6, 1958, the plaintiffs and the former owners agreed (*inter alia*) as follows:

(a) The plaintiffs agreed to lend to the former owners and the former owners accepted a loan of the sum of £40,068 13s. 9d.

(b) The former owners agreed to repay such sum to the plaintiffs with interest in accordance with the various provisions of the deed of loan and first mortgage within a period of 12 years by 18 half-yearly instalments, the first such instalment being due and payable on Jan. 1, 1962.

(c) The former owners further agreed to pay interest on the loan or on the amount advanceable or actually advanced up to Dec. 31, 1961, at rates in accordance with the various provisions of the deed of loan and first mortgage.

(d) The former owners further agreed by way of guarantee of the deed of loan and first mortgage to mortgage the *Acrux*, her apparel, tackle and furniture, to the plaintiffs and to charge the vessel, her apparel, tackle and furniture, in favour of the plaintiffs.

(e) The former owners further agreed that whenever payment, even of one single part of the debt due, should be delayed, the plaintiffs should be entitled to proceed for immediate recovery of their credit of capital, interest, incidentals and expenses in accordance with the provisions of the deed of loan and first mortgage.

The plaintiffs went on to allege that on Dec. 10, 1958, the deed of loan and first mortgage in favour of the plaintiffs upon the *Acrux* were duly registered at Palermo in the sum of £69,261 11s. 10d.

The former owners had failed to pay the sum of £51,413 17s. 4d., being the balance of sums due under the provisions of the deed of loan and first mortgage up to Oct. 16, 1961.

By a further mortgage dated Aug. 18, 1960, duly registered in accordance with the laws of Italy, on Aug. 23, 1960, the

former owners of the *Acrux* mortgaged her to the plaintiffs to secure overdrafts on current accounts amounting to £11,448 4s., together with interest, commission, legal charges and taxes. This sum was duly advanced to the former owners, but had not been repaid to the plaintiffs, and the sum of £13,067 5s. was due and owing to the plaintiffs in accordance with the provisions of the second mortgage.

The plaintiffs, accordingly, claimed the sum of £64,481 2s. 4d., being the sum of the amounts due and owing under the first and second mortgages.

Mr. Gerald Darling (instructed by Messrs. Crawley & de Reya) appeared for Banco di Sicilia.

Mr. DARLING said that the vessel had been sold by order of the Court for £45,500, and the net proceeds after deduction of the Admiralty Marshal's expenses were £42,625. None of the other claimants against the vessel was opposing the motion, their caveats having expired or been withdrawn.

Mr. Justice HEWSON said that the attention of the Court had been called to a somewhat alarming situation by a letter addressed to him from the Admiralty Marshal on Apr. 12. The relevant part said:

I feel it my duty to draw your attention to the fact that the purchasers of the vessel are meeting great difficulties with regard to deleting her from the Italian register because Italian law may not recognise that a vessel sold in proceedings *in rem* is sold with a clean title.

His LORDSHIP said that the Admiralty Marshal then referred to a letter dated Mar. 20, 1962, from an Italian lawyer named Signor Manca to Mr. Hugo Trumpy, the P. & I. Club representative in Italy of the present owners, and added:

. . . You may feel that the suggestion that the mortgagees still have rights against the vessel justifies inquiring into the Italian law governing recognition of judgments by the English Courts in actions *in rem* and the effect of sales by the English Admiralty Courts in such proceedings.

Signor Manca's letter of Mar. 20 stated:

I am informed now that the ship is charged by a mortgage of notable amount in favour to Banco di Sicilia. Also this

fact is very dangerous: the Banco di Sicilia as mortgagee might start an executive procedure on the ship not only in Italy but even in other countries.

He wrote further on Mar. 23:

. . . the order of sale had and has no efficacy in Italy.

Mr. Justice HEWSON recalled that as a result of the plaintiffs' intervention in 1961 the release of the ship by the Court was prevented. They had a perfect right, in their standing as mortgagees, to come to the Court, and, if their case was a proper one, they were entitled to judgment and payment out of the fund according to priorities. But before he could proceed to discover the merits of the claim, he said that he would require an undertaking. He went on:

If your clients are willing to undertake that they will not interfere with the title of the innocent purchaser anywhere else in the world, I will proceed to hear your case. Otherwise, I shall have to hear argument as to why I should proceed.

If I give you judgment, and then you choose to proceed against the ship *in rem* elsewhere under some rights, real or imaginary, in another Court in another country, that is an interference with the title given by this Court and, as I see it, against the comity of nations and against the well-being of the whole maritime world.

His LORDSHIP added that this would not affect the plaintiffs' rights in any liquidation proceedings *in personam* against the former owners. By asking for judgment, the plaintiffs were approbating previous actions of the Court in the same ship. If 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 those who give credit to ships.

His LORDSHIP then adjourned the Court to enable Mr. Darling to obtain instructions.

When the hearing was resumed, Mr. DARLING said that he had been authorized by his clients to give an undertaking that the plaintiffs, upon judgment being pronounced in their favour against the proceeds of sale of the *Acrux*, would not thereafter pursue

or institute any proceedings *in rem* against the *Acrux* in respect of the claim in the motion.

In support of his case, COUNSEL read affidavits by Filippo Serio, manager of the Palermo branch of the bank, and Pietro del Giudice, legal adviser to the Italian Consul-General in London, who said that according to Italian law the plaintiffs' mortgages were valid and properly registered.

#### JUDGMENT

Mr. Justice HEWSON: This motion is for judgment in default proceedings in respect of two mortgages held by the plaintiffs, the Banco di Sicilia, on the steamship *Acrux*. I have already pronounced upon the validity of the mortgages and given judgment as prayed. It is essential that I should say more than is customary in such motions. I propose first of all to go through the history of this case.

On Dec. 16, 1960, the *Acrux* was arrested in this country at the suit of a French company for necessaries. On Feb. 24, 1961, this Court gave judgment in respect of that company's claim and ordered appraisal and sale of the ship in order to satisfy it. On Mar. 4, 1961, the owners of the *Acrux* went into liquidation in Italy, that is, some days after the order of this Court for the sale of the ship. On Mar. 29, 1961, the liquidator in Italy applied to this Court, through solicitors in England, to suspend the order for sale, to give time to get in touch with all the creditors before this Court and to ascertain the amounts of their claims. The object of that application by the liquidator was to be in a position to pay off all such creditors and so obtain the release of the ship from the arrest of this Court. The order for sale was suspended for two weeks to enable all the creditors with claims before this Court to be heard, if they so desired.\* On Apr. 10, 1961, these mortgagees, the plaintiffs in this motion, entered a caveat against the release of the *Acrux*. It is fair to say that at about the same time other parties also entered caveats against the release. On Apr. 12, 1961, these mortgagees appeared at the resumed hearing and opposed the release of the vessel. The mortgagees refused to withdraw their caveat and asked the Court to restore the original order made, as I have already said, on Feb. 24, 1961.

\* [1961] 1 Lloyd's Rep. 471.

In view of this proper attitude on the part of the mortgagees and the amount of their claim, the Court had no option but to restore its original order for sale.† The order for sale was restored and negotiations for sale, which were then fairly advanced, were resumed, and on Apr. 27, 1961, the ship was sold for the amount of £45,500. The fund realized by that sale is in Court. The buyers of the vessel were Union Commercial Steamship Company of Monrovia. On Oct. 16, 1961, the mortgagees issued a writ against the proceeds of sale. In February, 1962, the Admiralty Marshal was informed that the purchaser of the *Acrux* was unable to get a certificate of deletion from the Italian Register of Ships, as a consequence of which the purchaser was unable to obtain permanent registration in the country of his choice. Certain inquiries were set on foot and, as a result, the Admiralty Marshal was given copies of letters which had passed between an Italian maritime lawyer in Genoa and the local representatives of the P. & I. Club interested in the *Acrux* under her new owners. Among other things, in one of the lawyer's letters appeared these words:

I am informed now that the ship is charged by a mortgage of notable amount in favour to Banco di Sicilia. Also this fact is very dangerous: the Banco di Sicilia as mortgagee might start an executive procedure on the ship not only in Italy but even in other countries.

I pause there to say that I do not read that myself as meaning that the Banco di Sicilia intended to take any such action, but that in the opinion of the Italian lawyer they might be free so to do. In a further letter from the same source appeared these words:

. . . the order of sale had and has no efficacy in Italy.

That is, the order for sale of this Court. In such circumstances, it is not surprising that the Admiralty Marshal made it his business to inform the Court as to what had transpired. He did so in a letter addressed to this Court on Apr. 12, 1962. The letter, so far as its contents are material in the present case, contains the following:

A motion for judgment in default of appearance in respect of a claim by Italian mortgagees is coming before you on Monday of next week.

† [1961] 1 Lloyd's Rep. 471, at p. 474.

The vessel was sold in pursuance of your order following a judgment in another action *in rem* early last year. Priorities were reserved and the net proceeds of sale are in Court.

I feel it my duty to draw your attention to the fact that the Purchasers of the vessel are meeting great difficulties with regard to deleting her from the Italian register because Italian law may not recognise that a vessel sold in proceedings *in rem* is sold with a clean title . . . I would refer you in particular to the postscript to the letter dated the 20th March 1962 from the Italian lawyer Manca to Hugo Trumpy (the Club representative of the present Owners). You may feel that the suggestion that the mortgagees still have rights against the vessel justifies inquiring into the Italian law governing recognition of judgments by the English Courts in actions *in rem* and the effect of sales by the English Admiralty Courts in such proceedings.

This morning, when the mortgagees appeared through Counsel on their motion, I felt it essential that I should mention these matters to them. Intervention by the mortgagees as interested parties about a year ago in effect prevented, or was certainly largely instrumental in stopping, the release of this vessel by the Court either to the liquidator or to other interested creditors in Italy or to the then owners. As I have already said, their actions then left no alternative but to cancel the suspension of the order for sale. The sale was effected and the title given by this Court to the purchaser was, in accordance with long-recognized practice in the maritime Courts of the world, a valid title.

I quote the following words from Dr. Lushington in the case of *The Tremont*, (1841) 1 Wm. Rob. 163, at p. 164:

The jurisdiction of the Court [—that is, the Admiralty Court—] in these matters is confirmed by the municipal law of this country and by the general principles of the maritime law; and the title conferred by the Court in the exercise of this authority is a valid title against the whole world, and is recognized by the courts of this country and by the courts of all other countries.

There is another case to which I wish to make some reference, namely, that of *Louis Castrique v. William Inrie and Another*, (1869) L.R. 4 H.L. 414. I read from the headnote:

Where a foreign Court, having competent jurisdiction in the matter, and honestly exercising it, delivers, in a proceeding *in rem*, a judgment, by which the sale of a chattel (a British ship then lying in the foreign port) is ordered, the sale cannot afterwards be impeached in this country in an action against the vendee, even though the person seeking to impeach it would, by the law of this country, have a preferential title to the chattel here.

Mr. Justice Blackburn said (*ibid.*, at p. 429):

. . . We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the state under the authority of which the Court sits [—in that case it was France—]; and, secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world.

Lord Chelmsford (*ibid.*, at p. 448) is reported as adopting in full the words of Mr. Justice Blackburn which I have just quoted.

As I see it, the title to the *Acrux* was given to an innocent purchaser, and the money he paid is in this Court to satisfy all legitimate claims regardless of the nationality of the plaintiffs according to their priorities. It may well be that the sum which represents the ship is insufficient to satisfy all the claims, or, indeed, wholly to satisfy the mortgagees' claim, which I am told exceeds £60,000. That is no fault of this Court, and any loss sustained by the claimants must lie squarely on them for advancing money against inadequate security, or, it may well be, because of the fall in value in shipping. Nevertheless, that was a risk that they or any other creditor takes.

The mortgagees, by claiming against this fund and praying the aid of this Court to recover their moneys, or such proportion of them as is possible, adopt and approbate the process of this Court in effecting the sale through its proper officer, the Marshal. The title given by such process is a valid title and must not be disturbed by those who have knowledge or who may receive knowledge of the proceedings in this Court.

So far as all claimants against this ship before her arrest are concerned, their claims are now against the fund in this Court and not against the ship properly sold to an innocent purchaser free of incumbrances. Were such a clean title as given by this Court to be challenged or disturbed, the innocent purchaser would be gravely prejudiced. Not only that, but as a general proposition the maritime interests of the world would suffer. Were it to become established, contrary to general maritime law, that a proper sale of a ship by a competent Court did not give a clean title, those whose business it is to make advances of money in their various ways to enable ships to pursue their lawful occasions would be prejudiced in all cases where it became necessary to sell the ship under proper process of any competent Court. It would be prejudiced for this reason, that no innocent purchaser would be prepared to pay the full market price for the ship, and the resultant fund, if the ship were sold, would be minimized and not represent her true value.

I cannot believe that ships' creditors keep themselves so ill-informed of the movements of the ship in which they are interested that they are unaware when that particular ship has been arrested and sold under an order of a Court of Admiralty, or unaware that such a sale gives and, so far as I can discover, always has given a clean title.

There are no damage or salvage claims. If there are other claimants *in rem* with claims which arose before the arrest of the ship by this Court, let them now claim against the fund in Court which represents that ship.

It would be intolerable, inequitable and an affront to the Court if any party who invoked the process of this 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. This Court recognizes proper sales by competent Courts of Admiralty, or Prize, abroad—it is part of the comity of nations as well as a contribution to the general well-being of international maritime trade.

It was with those thoughts in mind that I felt constrained to ask these claimants for an undertaking from them that they would not proceed elsewhere against this ship in respect of any unsatisfied balance

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The "Tropaioforos" (No. 2)

of their claim, nor institute proceedings *in rem*, or equivalent proceedings, against the *Acrux* anywhere in respect of their claim. I wish to make it clear that I have no knowledge or reason to believe that these mortgagees were contemplating the institution of further actions elsewhere against the ship, but having been put on notice and having regard to the difficulties which in fact the innocent purchaser has experienced in regard to his ownership, I felt it proper to take the course I have taken to-day, and I am grateful to the plaintiffs in this action for the attitude they have adopted.

—————  
The plaintiffs were awarded costs.

**QUEEN'S BENCH DIVISION  
(COMMERCIAL COURT)**

Mar. 1, 2, 30, 1962

ROYAL EXCHANGE ASSURANCE AND  
OTHERS v. COMPANIA NAVIERA  
SANTI, S.A.

(THE "TROIPIOFOROS" (No. 2))

Before Mr. Justice MEGAW

**Practice—Injunction—Jurisdiction of Court—  
"Res judicata"—Proceedings commenced  
by foreigner in foreign Court—Whether  
proceedings an abuse of process of English  
Court—Foreigner outside jurisdiction and  
without assets within jurisdiction—Juris-  
diction of Court to restrain foreigner —  
R.S.C., Order 27, r. 15.**

Total loss of foreign assured's steamship *Tropaioforos*—Claim by assured against I.M.A. Co. (one of insurers)—Agreement between assured and remainder of insurers that remainder of insurers subscribing *Tropaioforos* policies would be bound by result of action and that no other action would be brought by assured—Assured's claim dismissed by Pearson, J., holding that *Tropaioforos* had been scuttled—Proceedings commenced against insurers by assured in Greece—Appeal by assured withdrawn from Court of Appeal—Claim by insurers against assured by specially indorsed writ (notice of writ being served on assured out of jurisdiction) claiming injunction restraining assured from taking proceedings under policies against insurers in any country—Judgment by default entered by McNair, J., granting injunction and declaration that assured was bound by judgment of Pearson, J., and that all matters between assured and insurers were *res judicata*—Summons by assured that judgment of McNair, J., be set aside in that Court had exceeded its jurisdiction in granting injunction—Whether Court had jurisdiction to restrain foreigner not resident in England and without assets against which an order could be enforced from proceeding in a foreign Court, unless that proceeding would constitute an abuse of process of English Court.

—————  
*Held*, that, having regard to the agreement to be bound, the assured's proceedings in Greece were vexatious and oppressive; that the facts warranted a conclusion that assured had sufficient "connection with this country" to give the English Courts jurisdiction to grant an injunction restraining assured (albeit

tend that these basic faults were the result of being put in a position of difficulty created by the other ship. When the ships were four miles apart or only three miles apart there was plenty of time and plenty of sea room to avoid a close-quarters situation.

In my judgment both ships were equally at fault. Accordingly there will be judgment for the plaintiffs on the claim for half their damage, and judgment for the defendants on the counterclaim for half their damage.

QUEEN'S BENCH DIVISION  
(ADMIRALTY COURT)

June 25, 1992

THE "CERRO COLORADO"

Before Mr. Justice SHEEN

**Sale of ship — Sale by order of Court — Vessel subject to various encumbrances — Whether sale by Admiralty Marshal gave purchaser title free of all liens and encumbrances.**

The plaintiff bank lent a considerable sum of money to the defendants, the loan being secured by a mortgage on the defendants' vessel *Cerro Colorado*.

On Apr. 13, 1992 judgment was given for the plaintiffs against the defendants in the sum of U.S.\$26,014,308.89 and the Court made an order that the vessel *Cerro Colorado* be appraised and sold by the Admiralty Marshal in execution of judgment.

Before that order was made the Admiralty Marshal had been advised by the Spanish Embassy that a purchaser of the vessel might find himself subject to substantial claims by the crew for arrears of pay and severance pay. On Mar. 6, 1992 the master and crew had requested the entry of a caveat against the release of the vessel on the grounds that they had a right of action in rem including but not limited to a claim for wages unpaid since Jan. 1, 1992 and for severance pay. No writ in rem had yet been issued.

On June 10, 1992 an advertisement appeared in Lloyd's List referring to the forthcoming sale of *Cerro Colorado* and stating inter alia that:

Any eventual offeror or purchaser must be aware that the ship *Cerro Colorado* . . . [is] encumbered with several seizures, especially by virtue of a judgment of the Spanish Courts awarding its crew an amount of 700 million pesetas which is a privilege-rank debt, the enforcement of which shall remain prevailing notwithstanding any sale under the Orders of Admiralty.

On June 11, 1992 an article headed Tanker Sale Warning appeared in the newspaper.

As a result of these publications the Admiralty Marshal made an application to the Court for further directions and clarification of the legal effect of a sale by order of the Court.

*Held*, by Q.B. (Adm. Ct.) (SHEEN, J.), that (1) the Admiralty Marshal selling by order of the Court gave the purchaser a title free of all liens and encumbrances (*see p. 60, col. 2*);

(2) from time to time almost every shipowner wanted to borrow money from his bank and gave as security a mortgage on a ship; the value of that 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 (*see* p. 61, col. 2);

(3) the advertisement and the article might be treated as a contempt of Court as tending to interfere with the administration of justice; it was in the interest of all parties that the sale of *Cerro Colorado* by the Admiralty Marshal should achieve the full market price; these proceedings remained active until the ship was sold; no action would be taken in respect of either the advertisement or the article but any repetition of either would be regarded as a serious contempt (*see* p. 61, col. 2; p. 62, col. 1);

(4) no writ had yet been issued in respect of the claims by the master and the crew; in order to prevent any delay in the distribution of the proceeds of sale the Court had made an order that the master and crew should, if they wished to make a claim in rem against *Cerro Colorado* or her proceeds of sale commence proceedings within 28 days and thereafter proceed with expedition (*see* p. 62, col. 1).

The following cases were referred to:

*Acrux*, The [1962] 1 Lloyd's Rep. 405;  
*Castrique v. Imrie*, (1869) L.R. 4 H.L. 414;  
*Tacoma City*, The [1991] 1 Lloyd's Rep. 330;  
*Tremont*, The (1841) 1 Wm. Rob. 163.

This was an application by the Admiralty Marshal for further directions and clarification of the legal effect of the sale of the vessel *Cerro Colorado* by order of the Court in the action brought by the plaintiffs, Den Norske Bank A/S (formerly Bergen Bank A/S) the mortgagees against the owners of the *Cerro Colorado*.

Mr. Nigel Teare, Q.C. (instructed by the Treasury Solicitor) for the Admiralty Marshal; Mr. Angus Glennie, Q.C. (instructed by Messrs. Watson Farley Williams) for the plaintiffs.

The further facts are stated in the statement made by Mr. Justice Sheen.

#### STATEMENT

**Mr. Justice SHEEN:** In the light of matters which emerged at the end of last week, when the Admiralty Marshal made an application for further directions, I thought it would be appropriate to make a statement in open Court so that there can be no doubt about the position.

The plaintiff in this action is Den Norske Bank A/S, who lent a very substantial sum of money to the defendants. That loan was secured by a mortgage upon the ship *Cerro Colorado*. On Apr. 13, 1992 this Court gave judg-

ment for the plaintiff against the defendant in the sum of U.S.\$26,014,308.89. The Court made an order that the ship *Cerro Colorado* be appraised and sold by the Admiralty Marshal in execution of judgment. The Court made further orders of an administrative nature to enable the Admiralty Marshal to deal with the safety of the ship and the repatriation of her master and crew.

Before that order was made the Admiralty Marshal had received from the Spanish Embassy in London a "note verbale" setting out the views of an official of the Spanish Embassy upon Spanish law. The significant suggestion in that note verbale is that a purchaser of the ship might find himself subject to substantial claims by the crew for arrears of pay and severance pay if those claims would have been valid against the previous owner of the ship.

On Mar. 6, 1992 Messrs. Foot & Bowden, solicitors for the master and crew of *Cerro Colorado*, through their unions requested the entry of a caveat against the release of the ship *Cerro Colorado* on the grounds that the caveators claim to have a right of action in rem against the ship pursuant to the Supreme Court Act, 1981, s. 20(2)(o), including but not limited to a claim for wages unpaid since Jan. 1, 1992 in the sum of U.S.\$595,000 and for severance pay in the total sum of U.S.\$3,000,000 plus interest and costs. There are also two other caveats against the release of the ship. Although the master and crew stated early in March that they have a claim for wages against the ship, they have not issued a writ in rem. Until they obtain a judgment in rem they have no right enforceable against the ship or against the proceeds of sale.

On June 10, 1992 an advertisement appeared in Lloyd's List referring to the forthcoming sale of *Cerro Colorado* by the Admiralty Marshal and saying that this action has been opposed by the Spanish Trade Unions. Then followed this paragraph:

Any eventual offeror or purchaser must be aware that the ship *Cerro Colorado* and its owner Naviera Maura SA are encumbered with several seizures, especially by virtue of a judgment of the Spanish Courts awarding its workers an amount of 700 million pesetas, which is privilege-rank debt, the enforcement of which shall remain prevailing notwithstanding any sale under the orders of the Admiralty.

On the following day there appeared on the front page of Lloyd's List an article by the Industrial Correspondent headed "Tanker Sale



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