TOWARDS AN INTERNATIONAL INSTRUMENT FOR RECOGNITION OF JUDICIAL SALES OF SHIPS - POLICY ASPECTS

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INTRODUCTION

This paper is a general overview of the policy justification for the adoption by the Comite Maritime International of a proposed international Instrument for recognition of judicial sales of ships. It will discuss how present day commercial challenges facing the shipping industry are increasing the number of judicial sales of ships and the legal uncertainties concerning judicial sale of ships in present domestic and international legal regimes. The paper will analyze some of the policy choices adopted by the International Working group in preparing the 2nd draft instrument. I hope that this paper will assist consideration of the Instrument by the national maritime law association representatives to the Comite Maritime International 2012 Beijing Conference and to help inform their decision whether to adopt the Instrument with recommendations for going forward [2].

WHY AN INTERNATIONAL INSTRUMENT IS NEEDED

Why should the international marine community and its legal advisers concern themselves with international recognition of judicial sales of ships? Why should governments concern themselves with an international instrument to facilitate such recognition?

With the International Convention on Maritime Liens and Mortgages 1993 (the 1993 MLM Convention) now in force, the Working Group Questionnaire asked reasonably is it still necessary and feasible to have a separate international instrument to deal with issues regarding the recognition of foreign judicial sales of ships? The national maritime law associations who responded to this question fall into four groups. Four said yes, seven said yes with reasons, four said no and six said said no with reasons. Two responding countries deferred commenting on this point. Significantly, only two responses expressly commented that the 1993 MLM Convention has addressed recognition of judicial sales adequately. Three of the national maritime law associations which expressed doubt

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The analysis and conclusions in this paper are those of the author and do not necessarily reflect the views of the Canadian Maritime Law Association.

[2] In this paper I will refer to the 2nd Draft of the Instrument on International Recognition of Foreign Judicial Sales of Ships as the "Instrument" and the CMI International Working Group on Recognition of Foreign Judicial Sales of Ships as the "Working Group". The CMI Questionnaire in respect of Recognition of Foreign Judicial Sales of Ships is referred to as the "Questionnaire"

as to the need for a new instrument also commented on the need to at least consider amendments to the 1993 MLM Convention. Therefore the significant preliminary consensus is that work is needed to facilitate recognition of judicial sales, whether as a standalone convention or a protocol to the 1993 MLM Convention.

Current shipping (dis)economics increase the number and financial risk of judicial sales

These are difficult economic times for international trade and the shipping industry which services it. The combination of a surge of newbuilt ships entering the market, the slower, if not negative growth in commodity trades and turmoil in the financial industries and markets have combined to drastically restrict many ship operators' cash flow and potential access to operating capital, whether through investment or borrowing[3]. Even if vessels can be chartered or cargoes found , shipowners face the challenge of charter rates lower than operating costs. With cargo interests such as commodity traders facing their own market challenges, ship operators face increased commercial risks of attempts to evade existing contractual obligations or less timely or reliable payment from cargo interests or others in the chartering chain.

While shipowners must carry certificates of financial responsibility for some types of risks, and most ship operators in international trades have some form of P & I coverage, credit risk insurance is rarely purchased by ship operators. Freight, demurrage & defense coverage, even when purchased, indemnifies only for legal expenses. Therefore ship operators have increasing exposure to uninsured claims such as those of mortgagees or suppliers. Where a claim is uninsured and the ship operator lacks operating capital, a letter of undertaking or other security in place of arrest will not be voluntarily supplied and creditors will then resort to actual arrest proceedings, As an indication of market conditions, the number of arrest warrants issued through the Supreme Court of Singapore almost doubled between the first quarter of 2011 and the first quarter of 2012[4]

Without applicable insurance coverages, if the shipowner has no substantive defence or lacks sufficient cash reserves or potential for insolvency reorganization, an unopposed arrest will lead to judicial sale. The increased incidence of judicial sales puts into focus the need for a clear and

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[3] There has been extensive trade publication and even general media analysis of the financial challenges currently facing the shipping industry: "Shipping Industry Faces Economic Distress" http://www.naftrade.com/3/post/2012/08/shipping-industry-facing-economic-distress.html, "Handling the supply-side challenge remains top of the agenda" http://www.naftrade.com/3/post/2012/08/handling-the-supply-side-challenge-remains-top-of-the-agenda.html, Accessed September 2, 2012

[4] "Asia Shipowners: Bunker Fuel Issues Escalate" July 11, 2012 www.platts.com/newsfeature/2012/asiashipping/index Accessed September 2, 2012

consistent set of international rules for the legal consequences of judicial sale.

It is a sign of the times that the Managers of the North of England P & I Association have introduced an optional $1 million insurance facility underwritten through Lloyds for members entered for freight, demurrage and defence,

> .... To indemnify the Assured for financial losses incurred by them arising directly from a maritime lien claim being made on the declared vessel as a result of disputes, debts, etc. which originated prior to the Assured taking delivery of the vessel, and which were beyond the Assured's control.[5]

Uncertainty in the international recognition of judicial sales

This rationale for the Instrument was discussed in the response of Denmark to the questionnaire.

It is generally expressed that courts ought to recognize the effect of judicial sales carried on by foreign courts of competent jurisdiction as a matter of comity. In the absence of any applicable statute or international convention, the recognition of foreign judgments is a matter of judicial discretion. Between that objective and its application lie many layers of potential legal and procedural uncertainty.

- Was the proceeding a judicial sale?

- Did the court conducting the sale have competent jurisdiction?

- Did the judicial sale process give interested persons effective means of protecting their interest?

- How ought the foreign judicial sale to be recognized?

The cumulative effect of these uncertainties was demonstrated in the 1994 decision of the United States Fifth Circuit Court of Appeals in *Crescent Towing & Salvage Inc. v. the M/V ANAX*[6]

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[5] "FD&D Cover for MOA Risks, "Writ Search Facility" and Maritime Lien Insurance for Second-And Ships 2012-2013 Policy Year " Circular 2012-009 February 9, 2012 http://www.nepia.com/publications/clubcirculars/fdanddgeneral/1210/ Accessed September 2, 2012

[6] 4 F. 3d 744

> The United States District Court in this case was asked to recognize judgment of the Greek court which ordered the sale of a vessel registered in St. Vincent and the Grenadines pursuant to the foreclosure of a first preferred ship mortgage executed and recorded in St. Vincent and the Grenadines. These facts alone generate a plethora of confusing conflict problems. Additionally, Anax sought to use that Greek judgment to bar Crescent from enforcing the traditionally high ranking maritime lien for tug services, which directly benefitted the vessel and were furnished in US waters before both the recordation of the mortgage and the judicial sale. Further, Anax, a party claiming the benefit of the judicial sale purchased the vessel for $10 only the day after Norges, the mortgagee who precipitated the foreclosure, bought the vessel at auction.

The Court of Appeals remanded the case. The Court of Appeals did not consider there was sufficient evidence at first instance hearing to demonstrate that a foreign court of competent jurisdiction had ordered the sale, that the court conducted fair and regular proceedings, the sale was ordered pursuant to a validly entered judgment in a proceeding against the vessel and that the effect of the sale under the law of the foreign forum would be to extinguish all pre-existing maritime liens.

Other examples of difficulties encountered in the recognition of judicial sales of ships are described by the Chair of the Working Group, Prof. Henry Hai Li, in his paper " A Brief Discussion on Judicial Sale of Ships" published in the 2009 CMI Yearbook[7] and in responses of various maritime law associations to the Questionnaire[8].

Judicial comity does not meet the need for certainty

The responses by national maritime law associations to the Working Group questions on the domestic law of judicial sales show two significant commonalities.

First, domestic laws generally provide that a judicial sale is intended to permit transfer of a vessel free and clear of existing encumbrances. Second, none of the responses indicated that the purchaser of a vessel through judicial sale could operate it without first administratively applying for the registration of the vessel in the purchaser's name. While public and administrative law principles suggest courts ought to have the jurisdiction to compel a ship registry to give effect to a judicial

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[7] http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2009.pdf

[8] Synopsis of the Replies from maritime law associations, CMI Yearbook 2010 pp. 247-382

sale[9] occurring in the same country as the registry, absent a multilateral convention, domestic courts cannot compel a foreign ship register to recognize the judicial sale.

Article 12.5 of the 1993 MLM Convention does provide that " [u]pon production of such certificate [attesting to the judicial sale being free of liens and encumbrances], the registrar shall be bound to delete all registered mortgages, "hypothèques" or charges except those assumed by the purchaser, and to register the vessel in the name of the purchaser or to issue a certificate of deregistration for the purpose of new registration, as the case may be". This wording of Article 12.5 of the 1993 MLM Convention follows closely on the wording of Article 11.3 of the 1967 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages. However, as the 1967 MLM Convention was ratified by only five countries and has never come into force[10], and the 1993 MLM Convention is relatively recent, there is no judicial interpretation of which I am aware whether this wording was intended to apply only to the ship registry of the country whose courts ordered the forced sale, or whether the wording would also operate to require a ship registry in any 1993 MLM convention state party to give effect to a certificate of forced sale issued in any other state party. The proposed Instrument is intended to address this gap.

Limited scope of 1993 Maritime Liens and 1999 Arrest Conventions to judicial sales.

Articles 11 and 12 of the 1993 MLM Convention provide for notice of forced sale of vessels in the context of enforcement of liens and mortgages and for the effect of such forced sales. Article 3.3 of the International Convention on the Arrest of Ships ("1999 Arrest Convention") refers to judicial sales in the context of a provision limiting rights of arrest of ships for claims for which the owner of the ship is not liable. The 1993 MLM Convention does not provide for any requirement of notice of sale of types of claims for which a vessel may be arrested other than the types of liens and mortgages covered by the Convention, or of the legal effect of the judicial sale upon pre-existing claims against the vessel other than those for such types of liens or mortgages. There is a significant range of types of maritime claims not covered by the 1993 MLM Convention including claims arising from ownership disputes, materials and services supplied to a ship and contracts of carriage. Therefore there is no existing international convention which extends to procedural requirements or the legal consequences of judicial sales of vessels for all commonly occurring types of maritime claims. The Instrument is intended to cover this gap.

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[9] Subject always to the purchaser being qualified to own a vessel under the laws of that registry and any domestic laws requiring a ship registry to give effect to pre-existing rights.

[10] http://www.comitemaritime.org/Uploads/pdf/CMI-SRMC.pdf

Unlikelihood of early broad acceptance of 1993 Maritime Liens Conventions

This rationale was referred to in the responses by Canada, Croatia and France to the Questionnaire.

While each of the 1993 MLM Convention and the 1999 Arrest Convention is in force, the only significant ship registry state parties to the 1993 MLM Convention are the Russian Federation, Spain, St. Vincent and the Grenadines and Vanuatu[11]. The only significant ship registry state parties to the 1999 Arrest Convention are Liberia and Spain[12]. The existing potential for increased international application of the Arrest Convention is diminished by the reservation of Spain to exclude the application of the Convention in the case of ships not flying the flag of a state party.

Accessions to both conventions have continued into 2011, but the pace of ratification of the 1993 MLM Convention has slowed in recent years after a number of accessions in 2003 and 2004. While the substantive provisions of the 1999 Arrest Convention are relatively uncontroversial, there is less apparent international consensus whether the limited permitted scope of domestic maritime liens under Article 6 of the 1993 MLM Convention[13] give remedies sufficiently useful as to make harmonization of domestic laws on maritime claims now inconsistent with the provisions of the Convention politically palatable to domestic maritime industry communities or lawmakers[14].

Therefore I perceive, given the unlikelihood of early ratification of either convention by a significant

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[11] United Nations Treaty Collection http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-4&chapter=11&lang=en Accessed September 2, 2012 . As of this date, the other state parties are Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia and the Syrian Arab Republic

[12] United Nations Treaty Collection http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XII-8&chapter=12&lang=en Accessed September 2, 2012 As of this date, the other state parties are Albania, Benin,, Ecuador, Estonia, Lithuania, Monaco, Nigeria, Peru, Serbia, St. Kitts and Nevis, Tunisia and Ukraine.

[13] Article 6 permits domestic legislation for types of maritime liens other than those permitted by Article 4, but such additional liens survive transfer of a vessel for only 60 days and rank in priority below the limited number of liens listed in Article 4 and below ship mortgages.

[14] Canada recently has enacted maritime lien rights for ship suppliers to foreign flagged vessels, to ease the competitive disadvantage formerly suffered by its chandlers in comparison to ship suppliers operating from the United States, which have had similar statutory necessaries lien rights for some decades. The suppliers's lien legislation of both countries is inconsistent with 1993 MLM Convention Article 6.

proportion of fleet owning states[15], and the limited scope of application of the provisions of these conventions, the development and implementation of a standalone international instrument to clarify foreign recognition of judicial sale of ships is needed.

GENERAL PRINCIPLES

The Working Group has discussed several principles which guide the Instrument.

For the purpose of facilitating efficient recognition by a State Party of a foreign judicial sale of ship, certain necessary minimal requirements for conducting Judicial Sales should be laid down in this Instrument;

Some basic effects of Judicial Sales of Ships to be recognized by the State Party should be provided for in this Instrument;

Necessary and sufficient protection should be provided to Purchasers of ships by way of Judicial Sale so as to ensure that Judicial Sales of Ships may be maintained as an effective way of enforcement of maritime claims and enforcement of judgments or arbitral awards or other enforceable instruments against the owners of ships;

Effects of Judicial Sales of Ships as provided for by this Instrument should be recognized by all State Parties unless existence of one of the circumstances provided for by this Instrument in which recognition may be refused is proved by an Interested Person furnishing valid evidence;

As a general rule, once a ship is sold by way of Judicial Sale, the ship shall not be subject to arrest for any claim arising prior to its Judicial Sale;

Actions, if any, challenging a Judicial Sale should be allowed to be made by an Interested Person as defined by this Instrument only and before a competent court as provided for by this Instrument only;

[15] For a list of the 35 countries with the largest owned fleets, see UNCTAD Review of Maritime Transport, 2011 pp. 43-44, http://unctad.org/en/docs/rmt2011_en.pdf

Since the most convenient forum for assessing whether or not a Judicial Sale is regular or effective should be the court of the State in which the Sale took place, therefore it should be accepted that the competent court under this Instrument as having jurisdiction over actions challenging Judicial Sales should be a court of the State in which the Judicial Sale took place, including the court having conducted the Sale or its court of appeal which will be decided by the law of the State in which the Judicial Sale took place;

Conflicts with other international conventions, in particular the Maritime Lien & Mortgage Conventions of 1926/1967/193 and the Arrest Conventions of 1952/1999, should be avoided.

THE INSTRUMENT COVERS ONLY JUDICIAL SALES GIVING CLEAR TITLE

Some types of claims which can result in a forced or judicial sale of ships arise from special legislative rights or governmental operations, such as unpaid taxes and dues, wreck removal and pollution cleanup [16] . In the context of sale of ships, under Canadian law for example these remedies include forfeiture of property used in the commission of criminal offenses or acquired as proceeds of crime, forfeiture for breach of customs laws, pollution offences and sale of ships for unpaid harbour or canal dues [17]. Few of these special legislative rights explicitly confer clear title upon the purchaser of ships which are the subject of governmental claims.

A ship can be judicially sold in the context of admiralty proceedings, in which the usually anticipated types of claims are those associated with the operation of the ship such as mortgages or hypothecs or maritime liens or privileges. However, because the ship is also a chattel or a movable, it typically is, along with any other property of the shipowner, potentially the subject of legal proceedings for the enforcement of any judgment or arbitral award against the shipowner in personam. In common law jurisdictions, where an asset is sold as part of the process of enforcement of a judgment in personam, usually the sheriff, or other judicial officer conducting the sale has power to transfer only the judgment debtor's interest in the goods[18]. This means any sale of a chattel to satisfy a judgment is subject to the claim of any prior creditor or person with an interest in the goods.

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[16] For a general comparative law overview of special legislative rights and sale remedies against ships see Tetley, W. *Maritime Liens and Claims*, 2nd ed. Ch. 2 1998

[17] *Criminal Code* R.S.C. 1985, c C-46 as am. Part XII.1, *Customs Act* R.S.C., 1985, c. 1 (2nd Supp.) as am., s. 119.1. ss. *Migratory Birds Convention Act* S.C. 1994, c. 22, as am,, ss. 14, 17 *Canada Marine Act* S.C. 1998, c. 10, s. 117

[18] For example, *Court Order Enforcement Act* , RSBC 1996 c. 78 s. 62

If the domestic judicial sale procedures do not give clean title, this does not induce commercial confidence either for persons having an interest in vessels subject of such procedures, such as ship mortgagees, or for potential purchasers[19]. However, to effectively give clear title means that interested parties must have effectual notice of judicial sale proceedings so they may intervene to protect their rights. The holders of ship mortgage or hypothecs can to a certain extent, protect themselves through contractual stipulations that the shipowner give the secured creditor notice of any judicial proceedings against the vessel. However, claimants only with delictual liens such as tort victims typically would not have any contractual rights to obtain notice from the shipowner.

Many types of judicial sale procedures are of general application and may apply to the enforcement of small claims against limited assets of a debtor. In these situations, the transactional expenses of advertisements for sale and other procedures to protect the rights of creditors and others who may have an interest in the property which is the subject of sale could be significant or greater than the amount of the judgment debt itself[20]. In such situations it would be uneconomic to apply an expenses laden procedure giving clear title through judgment enforcement procedures, to enforcement against low value property. Ships, by contrast, are relatively high-value movables whose realizable value generally justifies the cost of due process to give notice to other interested parties.

In the context of insolvency proceedings, the law of countries varies whether the administrator of the property of a bankrupt shipowner will give clear title in selling the assets for the benefit of creditors[21]. Where the business of an insolvent shipowner is being restructured under court supervision, it is a common practice for the court to issue a vesting order granting title to purchasers of assets sold as part of the restructuring title to the vessel[22]. The issue of foreign recognition of marine insolvencies is currently under consideration by the CMI working group on that subject.

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[19] For a discussion of the legal uncertainties faced by lenders and purchasers, see Wood, P. *Comparative Law of Security Interests and Title Finance* 2007

[20] For example, in Canada, the cost of newspaper publication of a legal notice of judicial sale can be $3000 or more. In jurisdictions such as the United States, where the admiralty marshal takes possession of the arrested ship, custodial and insurance costs start at the tens of thousands of dollars.: http://www.usmarshals.gov/district/wa-w/admiralty/pdf/admiralty.pdf

[21] This is a provisional inference from a review of the responses of several national maritime law associations to the Cross-Border Insolvency IWG questionnaire, received as of the September, 2012 time of preparation of this article.

[22] A recent example of such vesting order is that given in the *Companies Creditors Arrangement Act* proceedings *In Re Vanship Ltd. and Vanguard Shipping* CV-12-9655-00-00CL (Ontario S.C.J): http://documentcentre.eycan.com/eycm_library/Vanguard%20Shipping%5CEnglish%5CCourt%20Orders%5CApproval%20and%20Vesting%20Order%20%28Re_%20Purchased%20Assets%20of%20Vanship%29,%20Morawetz%20J.%20%28July%2025,%202012%29.pdf accessed September 15, 2012

If the Instrument is adopted with its presently proposed definition of judicial sale, the Instrument will not apply to any ship sale procedure which does not by the operation of domestic law, give clean title. The present definition of judicial sale in the Instrument permits its implementation without the necessity of any state party having to amend its domestic law to ensure that any form of remedy or process for the judicial sale of a ship available in that jurisdiction gives clean title. Such remedy or process giving clear title could be in the context of exercise of governmental rights, or private creditors' civil claims, or insolvency proceedings. In this aspect, the Instrument effectively is self-implementing.

THE REASON FOR THE CLEAR TITLE CRITERION - EFFECT NOT PURPOSE

The clear title sale choice was the subject of considerable discussion during the meeting of the Working Group at Oslo in 2011 with other national maritime law association representatives present. Lawyers in the common law tradition may wonder why the Instrument refers to judicial sales giving clean title as the triggering factor for application of the Instrument, rather than the existence of an action *in rem* being chosen as the qualifying criterion. Civil law jurisdictions do not recognize the concept of an action *in rem* in the sense it is understood at common law[23]. The remedy of conservatory attachment or *saisie conservatoire* typically is available against other types of movables of the debtor as well as ships[24]. Because of the varying concepts in national legal systems as to the purpose of a judicial sale, such references to purpose found in the first draft of the Instrument have been deleted.

The common characteristic of a judicial ship sale after arrest in rem or through *saisie conservatoire* is that the sale is free and clear of encumbrances. The answers to the Questionnaire show a judicial sale of a vessel extinguishes mortgages, liens charges and encumbrances under the law of all responding countries except one[25] Therefore that resulting characteristic was selected as the practical choice of triggering factor for the application of the Instrument.

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[23] *Republic of India and Others v. India Steamship Company Ltd* [1997] UKHL 40; [1997] 4 All ER 380; [1997] 3 WLR 818, The *Indian Grace* [1998] 2 Lloyds Rep. 1

[24] Tetley *Maritime Liens and Claims,* 2nd ed. 1998 pp. 962-971.

[25] *CMI Yearbook* 2010 p. 222. Argentina, Brazil, Canada, China, Dominica, France, Italy, Malta, Nigeria, Singapore, South Africa, Sweden, USA and Venezuela stated yes without qualification. The responses of Belgium, Denmark, Germany and Norway indicated some procedural and one substantive qualifications. The one exception to the general rule was Spain.

APPLICATION OF THE INSTRUMENT

The terms "Maritime lien" and "Mortgage or hypothèques" are both defined in the context of claims recognized by the law "applicable in accordance with the private international law rules of the State" in which the ship is sold by way of Judicial Sale. These definitions are more expansive than those found in Articles 4 and 5 of the 1993 MLM Convention. The definitions recognize the reality of different choice of law rules applied by different states in the recognition of foreign maritime claims[26]. This choice of wording is another example of the inherent flexibility of the Instrument as being largely self-implementing and avoiding the need for changes to domestic states parties law.

Articles 2 and 9 would give great flexibility to states considering acceding to a convention based on the Instrument. The ratifying state may either adopt Article 2 in which the Instrument would apply to the recognition of the Judicial Sale taking place in the territory of any State" or reserve its rights under Article 9 to apply the instrument only to recognition of judicial sales made in the territory of a state party of a ship flying the flag of the state party. Article 9 gives additional flexibility to states parties to apply the principles of the Instrument to nonstate parties on a reciprocal basis. These provisions would make ratification of a convention based on the Instrument even more attractive, again by avoiding the need for changes to domestic law.

For a dualist state[27] intending to adopt the Instrument, the only significant amendments to domestic law required would be confirmation that its courts would recognize foreign judicial sales and permit or exclude challenges to foreign judicial sales in conformity with the Instrument and that its ship registry would act on certificates of judicial sale issued by other states parties. Such amendments are more likely to be perceived as being of an administrative or technical nature and less likely to attract political controversy, as distinct from changes to the law affecting the entitlement or priority of marine claimants to remedies under domestic law. For example, after decades of debate, the recent enactment in Canada of a maritime lien in favor of ship suppliers was accomplished only on the basis of a consensus reached through compromise between various industry groups that the lien would apply to foreign flag but not domestic flag vessels[28].

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[26] The most prominent example are the differing principles expressed in the *"IOANNIS DASKELELIS"* [1974] S.C.R. 1248, [1974] 1 Lloyd's Rep. 174, 1973 AMC 176 in which foreign circumstances giving rise to a maritime lien are recognized in the forum it even if the facts underlying the claim would not give rise to a maritime lien by the law of the forum and the "HLALCYON ISLE" (*Bankers Trust International Limited* v. *Todd Shipyards Corporation*) [1981] A.C. 221, [1980] 2 Lloyd's Rep. 325, 1980 AMC 1221 (P.C.) in which the characterization of circumstances giving rise to a maritime claim is regarded always as being a matter for the law of the forum.

[27] Which is to say a state whose constitutional or public law principles require enactment of domestic legislation to give internal effect to international conventions adopted by that state.

[28] S. 139, *Marine Liability Act* S.C. 2001 c. 6 as amended S.C. 2009, c. 21.

PROTECTIONS GIVEN BY THE INSTRUMENT

Notice to creditors

The price for a judicial sale giving clear title is notice to creditors. A judicial sale can be final if persons with an interest in or claims against the ship have a reasonable opportunity of participating in the legal proceeding in which the proceeds of sale of the ship are made available for creditors. The Working Group has proposed to largely track the wording of the notice requirements in Article 11 of the 1993 MLM Convention with some simplification having regard for current commercial practices[29]. As the Working Group member Benoit Goemans has commented "Rules of procedure are always the fruit of the difficult search for an equilibrium between on the one hand keeping the consumption of time and money as low as possible and then the other hand protecting the rights of whoever may be affected by the procedure"[30].

In considering the appropriate scope and procedure for notices, regard should be had for the relative power of self protection by potential classes of creditors. Marine mortgagees can voluntarily manage risk by monitoring the credit worthiness of shipowners and the stipulating for notices and events of default in ship mortgage deeds of covenants. Suppliers of services and materials likewise have choices in their selection of customers and extensions of credit. Potentially more vulnerable classes of creditors against a ship are tort victims of damage caused by a ship who may not have had any commercial dealings with the ship operator and existing or former crewmembers who may have wages or benefits in arrears.

The existing practice for the courts of many jurisdictions is to order an advertisement of the sale and pending priorities determination proceedings in the shipping trade press or other media outlets in areas where the arrested ship has operated. The administrators of insolvency reorganization proceedings in North America typically establish websites to publicize notices and orders in such proceedings. In this digital age[31], a general provision in any convention for recognition of foreign judicial sales of ships could include a generic requirement that the court or creditors under court

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[29] Working Group Commentary on the 2nd Draft of the Instrument, 2012

[30] Report on the key procedural elements of judicial sales of ships (second set of questions) *CMI Yearbook* 2010 p. 212

[31] Webpages accessed by mobile devices used in developing country areas have at least doubled since the summer of 2011 with 484 million developing country mobile device subscriptions by 2011: http://mobithinking.com/mobile-marketing-tools/latest-mobile-stats/b#mobilebroadband Accessed September 15, 2012

supervision publicize appropriate notice of the sale proceedings through electronic media in a manner likely to come to the attention of persons having business with the ship or to the attention of persons affected by the operation of the ship. This concept tracks the criterion for court recognition of substitute service of legal process in North American jurisdictions.

Compulsory registration of judicial sales

The answers to the Questionnaire show that only about half of the responding countries would regard the buyer under a judicial sale as having an automatic right to register the purchased vessel under the flag of the country which conducted the judicial sale. None of the responding countries laws apply extraterritorially to permit automatic registration under the flag of a foreign country without the purchaser first having to apply administratively for re-registration under the same flag or obtaining the deletion of the former registry and applying for registration under an alternate flag.

Articles 6 and 7 of the Instrument require the registry of states parties to act upon a certificate of judicial sale given either by the courts of a domestic state party or the courts of any other state party. The registry receiving such certificate is bound to delete all registered mortgages, hypothèques or charges except those assumed by the purchaser and either to register the ship in the name of the Purchaser or to delete the ship from the register and issue a deletion certificate. This provision fills a significant gap in present international and domestic legal regimes.

Standing to challenge a judicial sale

As a further control on the scope of potential challenges to judicial sales, the Working Group has proposed for the wording of Article 7.5 of the Instrument that only those claimants falling within the definition of "Interested persons" should have standing to intervene before the court conducting the judicial sale. The Instrument defines "Interested person" as "the owner of a ship prior to its Judicial Sale or the holder of the mortgage, hypothèques, charge, or maritime lien attached to the ship prior to its Judicial Sale."

Although the Instrument does not incorporate any of the provisions of the 1999 Arrest Convention or the 1993 MLM Convention by reference, one of the policy objectives identified by the Working Group is that conflicts with such conventions (and their predecessor conventions[32]) should be avoided. This raises the issue whether the class of Interested persons with rights have standing under the Instrument to challenge judicial sales should be interpreted as:

[32] That is, the 1952 Arrest Convention and the 1926 and 1967 MLM Conventions

a) restricted to only those claimants holding types of liens, mortgages, hypothèques, charges recognized under the 1993 MLM Convention; or

b) including claimants having any type of maritime claim which reasonably could be described as a mortgage, hypothèques, charge, or maritime lien under the law of the place in which the judicial sale is conducted.

If the interpretation described in subparagraph a) above is adopted, those having maritime lien rights inconsistent with Article 4 of the 1993 MLM Convention could be precluded from challenging judicial sales under the Instrument. More seriously, any creditor whose marine claim falls outside the application of the 1993 MLM Convention, like disputants over domestic lien or arrest rights given by contracts of carriage or vessel ownership, would be precluded from having standing to challenge a judicial sale under this narrower interpretation. Such interpretation is likely to make adoption of a convention based on the Instrument politically unattractive for any state which has not ratified the 1993 MLM Convention for the policy reasons that it considers the range of liens recognized under Article 4 of the 1993 MLM Convention too restrictive and also because such narrower interpretation would not protect the rights of types of marine creditors to which the 1993 MLM Convention does not apply.

Such interpretation would restrict the otherwise attractive self implementing characteristics of the Instrument, by creating unnecessary impediments to ratification by any countries whose laws recognize a broader range of maritime liens then does the 1993 MLM Convention. Such interpretation also would be inconsistent with the broad definition in the Instrument of Mortgages and Maritime liens as discussed above.

The proposed broader interpretation of Interested person would not be a direct operational conflict with the 1993 MLM Convention. If an Interested person brought an application to challenge a judicial sale conducted by a court of a country which had ratified the 1993 MLM Convention and also a convention based on the Instrument, it would be open to the court to exercise its discretion to refuse the challenge on the grounds that the Interested person did not have a claim of sufficient priority. Standing to claim and the exercise of discretion whether a remedy should be granted are distinct matters.

The Working Group also has identified a policy goal that the Instrument should have a wide scope of application. Because one of the fundamental reasons for the proposed Instrument is to meet the need to clarify the effect of judicial sales in the absence of broad ratification of the 1993 MLM Convention, in order to encourage broad and early adoption of a convention based on the Instrument, I encourage the national maritime law associations who will vote on the proposed Instrument to look favourably upon the broader interpretation which is described above in subparagraph (b).

Restrictions on challenges to judicial sales

The 1999 Arrest and 1993 MLM Conventions do not explicitly prohibit courts from assuming jurisdiction to consider an application challenging the validity of a judicial sale conducted in another country. While we can hope that courts would be mindful of not proceeding to rule upon the ownership of vessels unless there were appropriate connecting factors for assuming jurisdiction, courts typically allow standing to any person domiciled or regularly carrying on business within the courts' own jurisdiction. The ranking in priority claims against the ship generally is regarded as governed by the law of the forum[33]. Under present law, the way is open for a ship's creditor to choose not to attorn to a maritime law priorities hearing in a jurisdiction whose claim recognition or priority rules the creditor thinks are unfavorable to their interests but rather try to claim against the vessel after the judicial sale. The creditor may attempt to claim either in the creditor's own domicile or before the courts of a jurisdiction with priority rules more favorable to that creditor's claim.

Although civil law courts will consider issues of jurisdiction whether or not a party before the court raises such issue, common law courts are reluctant to raise jurisdiction of their own motion. The general procedural principle of the common law is that interested parties are responsible themselves to appear before the court and to choose what issues they wish to raise. Therefore the purchaser of a vessel through a judicial sale effectively is required to take the initiative and incur the expense in challenging later attacks by creditors on the validity of the judicial sale. A purchaser of a vessel through private sale can at least contract for an indemnity against subsequent claims by those whose claims arose before the sale. It is very unlikely any governmental authority would compensate a purchaser under judicial sale for loss of commercial use of the vessel or the legal expenses of having to protect their title against subsequent claims which had arisen before the judicial sale[34].

Article 7.3 of the Instrument prohibits any challenge to a judicial sale except before the court through which the judicial sale is conducted. At least between states parties, forum shopping by creditors seeking the law of jurisdictions favorable to those creditors' interests is therefore prevented.

Article 7.3 gives further advantages. First, it encourages all persons with claims against the arrested vessel to intervene or prove their claims in the same court as where the judicial sale is being

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[33] Tetley, *International Conflict of Laws*, p. 551.

[34] In the " Galaxias" the purchaser of a vessel under a Canadian judicial sale, when faced with a demand by the ship's foreign registry for payment of arrears of seafarers pension contributions before it would recognize the Canadian judicial sale, counterclaimed against the Deputy Marshal who had conducted the judicial sale for damages in failing to transfer the ship free and clear of encumbrances. The Federal Court dismissed the counterclaim *Canada v. Galaxias;* 1988 CarswellNat 144F; [1989] 1 C.F. 375, [1989] 1 F.C. 375, 20 F.T.R. 141;.

conducted. There is less risk of conflicting determinations from multiple proceedings. Second, once a creditor intervenes or proves its claim before the court conducting the judicial sale, under generally accepted principles of submission to jurisdiction, the creditor, having attorned to the court, is bound by that court's determinations as to the validity and priority of the creditor's claim[35]. This principle is further strengthened in the context of a judgment *in rem* which is regarded as binding internationally[36] . Foreign courts, and even those of the creditor's own domicile, are not likely to permit the creditor to pursue collateral legal challenges to a judicial sale in a proceeding in which the creditor participated.

The focusing of rights of recourse against the validity of judicial sales to only the courts of the country in which the sale was conducted is of fundamental importance and a significant improvement on the state of existing law.

Finally, Article 8.1 of the Instrument emphasizes that a request by an Interested person must be presented within one year of the date of the certificate of Judicial Sale, which " period shall not be subject to any suspension, interruption or extension whatsoever."

CONCLUSIONS

1. Present and foreseeable market conditions in the shipping industry have and will increase the incidence of judicial sales of ships. Therefore the risk, expense and diseconomies of legal uncertainty associated with foreign recognition of judicial sales will increase also.

2. The national maritime law association responses to the questionnaire show a consensus that additional work is needed, either through a standalone instrument or amendments to the 1993 MLM Convention, to facilitate foreign recognition of judicial sales of ships.

3. The partial protection for judicial sales given by the 1993 MLM Convention is restricted by the very limited number of significant ship registry states which have adopted the Convention and the unlikelihood that the pace of ratifications will increase in the foreseeable future.

4. The present 1993 MLM Convention is not a sufficiently wide foundation for foreign recognition of judicial sales because it is silent on the legal effect of judicial sales to clear title for types of maritime claims which are not covered by that Convention.

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[35] Keyes, M. *Jurisdiction in International Litigation* 2005

[36] *Pattni v. Ali & Anor (Isle of Man (Staff of Government Division))* [2006] UKPC 51

5. The Instrument would have significantly greater potential for ratification then has the 1993 MLM Convention because of its effects based definition of judicial sale and because of the unlikelihood of inconsistency of its terms with existing domestic laws on maritime claims. It is largely self-implementing.

6. The Instrument confers significant advantages not widely available under existing international or domestic law in that:
    - the legal effect of judicial sales is a rule of general application
    - the legal effects of judicial sales are explicitly stated
    - reasonable procedural safeguards are given to interested parties
    - forum shopping by aggressive creditors seeking to challenge judicial sales is effectively precluded
    - the availability and scope of challenges to judicial sales is carefully circumscribed
    - within the scope of state parties, ship registers must give effect to foreign judicial sales
    - room is given for further reciprocal recognition of non state parties' judicial sales

In short, in these challenging times for the international shipping industry a standalone international convention on the foreign recognition of judicial sales of ships is needed.

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