

The Key Issues of Effect of Judicial Sales of Ships in Beijing Draft

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Abstract: Combining with analysis of the formulations in Beijing Draft and discussion of theories and legislative practice of the nature and legal effect of judicial sale of ships, Beijing Draft applies to the judicial sale of ship by which the purchaser obtains the clean title of the ship. International effect of judicial sale of ships is different from recognition of judicial sale of ships, and it is appropriate that Beijing Draft used “international effect of judicial sale”. In addition, legal effect of judicial sale and international effect are two matters. The international effect and how judicial sale of ships can realize the international effect are the main contents of the convention on judicial sale of ships. The condition that a judicial sale of ship has international effect is that the judicial sale was conducted in accordance with the notice requirements in the convention, and the circumstance in which a judicial sale of ship has no international effect is the sale would be manifestly contrary to public policy or the sale was procured by fraud committed by the purchaser.

Keywords: international effect; judicial sale of ships; Beijing Draft

Introduction

To maximize the value of a ship, judicial sale confers clean title to the ship on the purchaser. However, ships, especially the ships engaged in international shipping, have international mobility. Because of that, when a ship is sold through judicial sale in a State, interested persons are likely in other States. In the situation, if the State of deregistration or/and registration or/and the creditors who has the right attached to the ship refuses to recognition an effective judicial sale conducted in another State, the purchaser’s right is certainly derogated. Thus, the issue of international effect of judicial sale of ships is proposed to be solved by drafting the Convention on the Judicial Sale of Ships (hereinafter called Beijing Convention). At the 40th meeting of the Comité Maritime International (hereinafter called the CMI) in Beijing in October 2012, the recognition on the judicial sale of ships was one of the most important topics and then a proposed draft instrument about judicial sale of ship was prepared by the CMI. At present, the draft instrument (hereinafter called Beijing Draft) has been revised five times by the Working Group VI of United Nations Commission on International Trade Law (hereinafter called the Working Group VI). Those instruments provide provisions about international effect of judicial sale. At the meetings held by the

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Working Group VI, many States have proposed the recommendations for revision of the instrument. Preliminary consensus was reached on some issues, but most of the provisions remained controversial. In particular, the main issues of the Draft Instrument on the Judicial Sale of Ships, the international effect of ship judicial sales and the conditions for having international effect, have not been agreed. To solve the issues, this article is divided into three main parts. In the first part, the nature of judicial sale of ships will be clarified by analysing the main theories about the nature of judicial auction. Secondly, the legal effect of judicial sale of ships will be discussed based on the theories about the nature of judicial auction. And the fact that different international covenants and national legislations choose different legislative models of legal effect of judicial sale of ships will be introduced. Then, legal effect of judicial sale in Beijing Draft will also be analysed. In the third part, distinguish the international effect and the recognition of the judicial sale, and further distinguish the international effect of the judicial sale and the legal effect of judicial sale. And finally, evaluate and analyse the conditions for the judicial sale to get international effect in Beijing Draft.

I. Nature of Judicial Sale of Ships: a Public Behaviour or a Private Action?

Before drafting the Draft Instrument on the Judicial Sale of Ships, primarily due to the low frequency of use of the term “judicial sale”, the term “judicial sale of ships” is relatively rare in both academic works and legislative documents at home and abroad. For instance, Chinese academic circles generally use “compulsory auction” or “judicial auction”, and the terms in the legal and judicial interpretation are not unified and constantly changing. Internationally, both the conventions and the academic circles have not made a formal distinction and discrimination between “forced sale” and “judicial sale”, let alone the authoritative and generally accepted words on the term “judicial sale of ships”.

According to Draft Convention on the Judicial Sale of Ships: Annotated Fifth Revision of the Beijing Draft (hereinafter called the Fifth Draft),¹

“‘Judicial sale’ of a ship means any sale of ship:

- (i) Which is ordered, approved or confirmed by a court or other public authority either by way of public auction or by private

¹ Article 2, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft. And the Draft Instrument on the Judicial Sale of Ships: Annotated Fourth Revision of the Beijing Draft and the Draft Instrument on the Judicial Sale of Ships: Annotated Fifth Revision of the Beijing Draft continue to use this definition.

treaty carried out under the supervision and with the approval of a court; and
(ii) For which the proceeds of sale are made available to the creditors.”

The definition actually indicates the conditions to constitute judicial sales of ships rather than nature of judicial sale of ships. There is little discussion directly on the legal nature of the judicial sale of ships. Both in China and internationally, there is little discussion directly on the legal nature of the judicial sale of ships before this. Although there is no conclusion, they have also formed three relatively concentrated theories of the nature of judicial auction: private law theory, public law theory, and eclectic theory. The three theories are generated from different time backgrounds and suitable to different regions. They have different theoretical and practical significance based on different value considerations and choices. To clarify the legal effect of the judicial sale of ships, it is necessary to identify its nature. The nature of judicial sale of ships will be discussed combining with provisions of the Beijing Draft and the three theories.

A. Private Law Theory

In private law theory, the power of the court to auction a ship comes from the private rights of the creditors, so the ship auction belongs to the category of private law, and the auction system in the national civil law shall be applied. Both arbitrary auction and forced auction are regarded as the special sale adopting competitive contract procedures. And forced auction is the same as arbitrary auction, is a private law act, and the provisions of the civil law or contract law shall apply. In the judicial auction of ships, the auction announcement as the invitation to offer, the due price as the offer, the auction as the commitment, the bidder obtains the ownership of the subject matter following the way of acquisition cession, and the executive auctioneer (authority) is just the agent of the creditors². In one words, a judicial auction of a ship is just a sale in the nature of the private law.

Private law theory emphasizes the transaction nature of such a sale, but it ignores the strong intervention of the public power in judicial auction of ships. And judicial auction does not apply the principles of equal negotiation and agreement which apply in the general sale. Although it is undeniable that a judicial auction is a sale, it is not completely same as an arbitrary auction. Actually, the executive auctioneer is not the

² Chen Zongrong, *Theory of Civil Procedural Law and Object of Procedure* (National Taiwan University College of Law Press, 1988) 71-72.

agent of the creditors. Both the court and other public authority that order, approve or confirm the judicial auction have not signed an agency contract. In other words, the sale that the court or other public authority selling a ship in judicial auction or forced auction is not based on an agency contract but the right of disposal in public law. In addition, the court and other public authority are likely to entrust an auctioneer to carry out the auction of a ship. The position of the auctioneer in judicial auction and position of it in arbitrary auction are different. In arbitrary auction, the principals, the sellers of ships, and the auctioneers are equal civil subjects. However, the auctioneers in judicial auction accepting consignment from the court or other public authority are not only civil entrusted auction but also assisting in enforcement³.

Thus, private law theory supports that judicial auction or forced auction of a ship is an act of private law nature, and ignores that the court and other authority have the right of disposal in public law. Thus, although the theory has revealed some features of judicial auction, it fails to completely demonstrate the nature of judicial auction.

B. Public Law Theory

In public law theory, the judicial auction of ships is a public law act. Although the judicial sale of ships is conducted by auction, it does not equate in the legal effect to the contract of sale between equal subjects in private law, so it is different from the private law auction. For it is clear that in the general sales contract, the buyer has not more rights than the seller, but the judicial auction of the court is completely different, it has a strong credibility, the purchaser originally acquired the clean title of the ship according to the effect of public law. It also argues that the enforcement agency replaces the creditor of private law, occupies the right of enforcement to the debtor, and that the power of the State agency and executive officials comes not from the authorization of the parties, but from the public power of the State. And the creditor obtains the executive claim against the enforcement agency based on the entity's rights.

Thus it can be seen, public law theory is very different from private law theory. First of all, the theoretical basis of public law theory is the theories arising under the evolution of the legal theory of civil procedure to the public legal structure, such as theory of public expropriation and disposition⁴. In these theories, the enforcement agency replaces the position of creditors in private law theory, especially the exclusive right to enforce against the debtor. The power of State agencies and executive officers is

³ Liu Ningyuan, 'On the Compulsory Auction and the Rules of It' (2004) 5 *Politics and Law* 53.

⁴ A. H. B. Constable, 'Expropriation of Land for Public Purposes' (1901) 13 *Juridical Review* 164.

not from the authority of the parties but from the public power of the State. The supporting theory of judicial auction becomes the aforementioned public law theory, and not the legal behaviour theory in civil law. Therefore, both the nature and effect of the judicial sale of a ship have changed. The public law theory completely denies the private law theory, which believes that the judicial auction of a ship is not a private law sale, but a public law act. Moreover, on the effect of the sale, the purchaser originally gets the clean title of the ship.

Public law theory seems to be reasonable, since it takes cognizance of the public law disposal nature of the sale process. However, it ignores private law features in the sale process. From the perspective of rights and obligations, there are also private law acts such as payment for goods and transfer of the ship in the sales process. Thus, although judicial auction of ships is not completely same as arbitrary auction and civil sale of ships, there are still private law features in the process of judicial auction. Public law theory highlights invention of the public law disposal in judicial auction, but ignores that judicial auction as auction has features of private law. Therefore, like private law theory, public law theory fails to completely demonstrate the nature of judicial auction.

C. Eclectic Theory

Eclectic theory holds that judicial auction originates from the right of disposal in public law, but also has the nature of sales transaction in civil law (contract law). In the legal relationship of judicial auction, the debtor is the seller and the auction bidder is the buyer. After the auction bidder obtains the ownership of the auctioned property, on the one hand, it can claim on account of defects, and on the other hand, it should bear the burden on the auctioned property. When the auctioned item is owned by a third person, the auction bidder cannot take possession of the auctioned item.

The theory combines private law theory and public law theory. It not only affirms that judicial auction is the public law disposal, but also does not ignore judicial auction's nature and effect of a sale in private law. On the one hand, judicial auction of ships is of private law nature since is still conducted in the form of sale. The auction bidder shall participate in the bidding on the premise of freedom and equality. After the auction is completed, the original ship owner shall be obliged to deliver the ship to the auction bidder, and the auction bidder is obliged to pay the price of the ship according to the agreement. On the other hand, judicial auction is different from private law contractual sales due to the intervention of public power. From the purpose of setting

the auction system, it aims to maximize the economic value that ships contain through certain procedures, so as to make the creditor's claims fully satisfied. This special purpose of judicial auction requires it to have its own special rules. In terms of legal effect, the auction should emphasize the stability so as not to cause new legal relationship due to auction and complicated the execution procedures. However, if judicial auction is completely equivalent to the arbitrary auction, the above special system design will not be achieved, and the original purpose of the auction system setting will also be greatly affected accordingly. On the contrary, if judicial auction is carried out with the intervention of the public power, it is able to not have to stick to the general principle of sale in private law. In addition, the enforcement relationship between the court or other authority and the creditors and the debtors is not a general private law agency relationship, but a public law relationship between the State institution and the citizens.

Overall, eclectic theory defines the nature of judicial auction of ships more completely. It affirms that judicial auction is the public law disposal, and has the nature and effect of a sale in private law. It is worth noting that judicial auction of ships is not exactly equivalent to judicial sale of ships, especially judicial sale of ships in Beijing Draft. According to definition of judicial sale of ships in the Fifth Draft, the way to conduct judicial sale includes public auction, but is not limited to auction. Private treaty carried out under the supervision and with the approval of a court is also one way of judicial sale. It is clear that judicial sales by both public auction and private treaty are carried out under the supervision and with the approval of a court. And that means judicial sale of ships must be carried out with the intervention of the public power. Thus, the nature of judicial sale of ships is the same as the nature of judicial auction of ships. In other words, judicial sale of ships not only has the nature and effect of a sale in private law, but also has the nature of the public law since it conducts with the right of disposal in public law.

II. Legal Effect of Judicial Sale of Ships: Dose the Purchaser Obtain Clean Title of the Ship?

A judicial sale of ship going into effect is prerequisite of obtaining the international effect. It is necessary to define the legal effect of judicial sale of ships, and the conditions that a judicial sale can get the effect. Is acquisition of ships' ownership by judicial sales original acquisition or derivative acquisition? There is both theoretical and

practical significance of this issue⁵. If considering that purchasers of ships acquire ownership according to original acquisition, the purchasers shall not bear the burden previously attached to the ship, such as mortgage. That means the burden is extinguished because of original acquisition. On the contrary, if it is deemed that the purchasers acquire ships' ownership by derivative acquisition, the burden remains to be attached to the ship and is not extinguished by judicial sale for *nemo plus juris ad alium transferre potest, quam ipse habet*^{6,7}. In fact, the dispute on legal effect of judicial sale of ships is closely related to aforementioned theories about nature of judicial sale. Based on the discussion on the nature of judicial sale of ships, the significant issue is that what legal effect of judicial sale of ships is able to be discussed.

According to private law theory, every sale, whether arbitrary or judicial, is private law scope. The power of enforcement of a State agency or executive officer comes from the authority of the creditor, and the State agency or executive officer is only the agent of the creditor. As judicial sale is the same as private sale, the purchasers acquire ships' ownership by derivative acquisition⁸. If the ship is not owned by the debtor, the purchaser certainly cannot acquire the ship's owner⁹. In addition, the purchaser has claims on account of defects. For the objective needs of maintaining public order, remedy by public force gradually replaces private remedy. That lead to the phenomenon that judicial sale belongs to public law behaviour gradually dominates. In accordance with public law theory, the acquisition of the ownership of the ship is based on the disposal of public law, similar to the State expropriation, and the purchaser shall be the original acquisition. That means whether there are creditors who can assert rights against the ship or not, the purchaser can get clean title of the ship by judicial sale. At the meantime, the purchaser does not have claims on account of defects. However, the legal effect of judicial sale that extinguishes the burden previously attached to the ship contradicts protection of vested right principle. The contradiction is likely to put the procedural law provisions on the judicial sale of ships in conflict with the substantive law norms conferring the corresponding substantive rights on the creditor. Then, eclectic theory attempts to eliminate the conflict. In eclectic theory, on the one hand, the judicial sale stems from the public law right of disposal, and on the other hand, it

⁵ Zhou Hongkai, 'On Legal Nature and Effect of Forced Auction of Ships' (1998) 2 *Seamanship* 70.

⁶ This is a Roman Law Proverb, and means that no one can transfer more right to another than he has himself.

⁷ Zhou Hongkai, (note 5), 71.

⁸ Yang Yuling, *On Compulsory Execution Law* (Wunan Book Press, 1999) 448.

⁹ Qi Shujie, Chen Xiangui, 'Forced Auction of Immovable Property and Protection of Rights of the Third Parties' (2010) 4 *Journal of Gansu Institute of Political Science and Law* 83.

affirms limited retention of the interests of specific entities and existence of the purchasers' claims on account of defects¹⁰.

Actually, the above theoretical disputes essentially reflect the different tendency to protect the rights and interests of the different parties involved in the judicial sale of ships. Private law theory tends to protect the creditors who can assert rights against a ship, but ignore the protection of purchasers' rights. On the contrary, public law theory emphasizes the protection of purchasers' rights but belittles the protection of creditors' rights. It seems that eclectic theory considers to protecting the rights of all parties, but it may lead to multiple litigations and then wastes judicial resources since the purchaser acquires the ship's ownership by derivative acquisition and has claims on account of defects. The creditors can assert rights against the ship and then the purchaser may have to assert claims on account of defects. For instance, after the purchaser acquired the ownership of the ship by judicial sale, if there had been maritime liens to the ship, the maritime claimants of maritime liens could still realize their rights to the ship as the maritime liens transferred along with the ship. However, if the purchaser had not known the existence of the maritime liens to the ship, there were defects on the ownership of the ship, because the ownership of the purchaser was restricted. After maritime liens are realized, the purchaser will exercise the claim on account of defects to make up for the loss.

In practice, no matter what theory is adopted, there will be certain rationality and disadvantages, and the real key lies in the value orientation of judicial policies and what means to use under certain policies to weaken its disadvantages. Different international covenants and national legislations make different regulations on the issue¹¹. The regulations can be broken up into three modes, principle of bearing, principle of eliminating, and residue principle, which is combination of the first two modes. Combining with regulations of different international covenants and national legislations, the three modes will be discussed so that it can be ascertained that what legal effect the judicial sale in Beijing Draft should be.

A. Principle of Bearing

According to principle of bearing, the security interest of the ship and the creditors' rights closely related to the ship shall not be extinguished by judicial sale, but shall be borne by the purchaser with the transfer of the ship. In Norway, the ship is

¹⁰ Ibid.

¹¹ Xiang Minghua, 'On Independent Value of Ship Auction Procedure' (2008) 61 *Wuhan University Journal (Philosophy & Social Sciences)* 178.

transferred to the purchaser when the price is paid off, and all the priority claims of creditor's are still attach to the ship after the transfer. This legislative mode can be well connected with the theory of the trace effect of real rights and derivative acquisition in the civil law¹². As the security interest of the ship and the creditor's rights are transferred with the ship, the purchaser acquires the ship's ownership by derivative acquisition and does not get clean title of the ship. And because of that the price of the ship will be relatively low in judicial sale, which is conducive to stimulating sale.¹³ Furthermore, since the security interest of the ship and the creditor's rights closely related to the ship shall not be extinguished by judicial sale, the creditors' rights are able to get great protection.

However, on the other hand, the purchaser is likely to be asked to reimburse the debt or bear the burden attached to the ship after judicial sale, which may lead to new litigation and further result in lead to the waste of judicial resources to a certain extent. In addition, if the purchasers take into account the creditor's right to recovery, they are likely to hesitate to participate in the sale. Moreover, the court needs to determine and evaluate the scope of right burden of the purchaser to determine the price payable by the purchaser in judicial sale of ships, and the valuation is easy to restriction and influence by various factors, and its inaccuracy will directly affect the interests of the creditors, the debtor and the purchaser.

In one words, even if following principle of bearing can protect the creditors' rights on the sold ship, it actually not only makes purchaser acquire unstable ownership, but also may derive another litigation and affect the willingness to buy of the purchaser. Considering to avoiding waste of judicial resources and maximizing the value of the ship through judicial sale, there are few States adopting principle of bearing. In addition, the principle is contrary to one of the purposes, protecting the purchaser's right, of enacting Beijing Draft, so the principle deservedly is not applied.

B. Principle of Eliminating

In principle of eliminating, after the judicial sale procedures of the ship, the maritime claims attached to the ship, including mortgages, maritime liens, liens, encumbrances, rights of use and rights of retention, will be extinguished, and the purchaser of the ship will not bear any risk based on the debt burden of the ship.

¹² Wu Xingkui, 'In Forced Sale Ships All Quarters Litigant Legal Relationship Analysis' (2006) 5 *Journal of Chongqing University of Arts and Sciences (Social Sciences Edition)* 40.

¹³ Nie Shuheng, Fu Tingzhong, 'The Consideration of Mechanism Concerning "Clean Vessel"' (2019) 30 *Chinese Journal of Maritime Law* 82.

Comparing with principle of bearing, principle of eliminating has following advantages. First, the burden of rights attached to the ship is eliminated by the sale, and the purchaser can acquire clean title of the ship. Therefore, the purchaser gets a stable and complete ownership of the ship, and its ownership will not be restricted or lost because of the burden of rights attached to the ship. Second, based on the first advantage, the public's desire to participate in the sale can be effectively stimulated. Third, the value of the ship can be maximized as the final purchaser is able to acquire clean title of the ship through judicial sale and more bidders are willing to participate in the sale. However, it must be admitted that principle of eliminating ignores the interests of the third party who has the rights attached to the ship, and sometimes even leads to the security interest of the ship and the creditor's rights difficult to be protected. For example, when the mortgagee of the ship cannot get repayment from the debtor, as the rights attached to the ship has been eliminated through judicial sale, the mortgagee is unable to exercise the mortgage right by claiming the exercise of the guarantee real right to the purchaser, which may finally result in huge loss of the mortgagee .

In action in rem of the United Kingdom¹⁴ and the United States, the legal effect of judicial sale of ships is obviously adhering to principle of eliminating as the purchaser originally gets the clean title of the ship. And it is believed that International Convention on Maritime Liens and Mortgages 1993 (hereinafter called International Convention 1993) applies principle of eliminating. According to Article 12, Paragraph 1, only if the forced sale of the ship in a State Party meets the specified conditions, all registered mortgages, "hypothèque" or charges, except those assumed by the purchaser with the consent of the holders, and all liens and other encumbrances of whatsoever nature, shall cease to attach to the ship¹⁵. The specified conditions are that the ship should be in the area of the jurisdiction of such State during judicial sale, the sale has been affected in accordance with the law of the said State, and the provisions of International Convention 1993.¹⁶ Thus, it is argued that principle of eliminating is not ignoring the legal effects of the elimination of the third party's rights which have been attached to the ship, because one premise that the elimination of rights attached to the ship is that judicial sale should go through due procedure. In China, there is similar due procedure to make the application of principle of eliminating more reasonable and

¹⁴ D.C. Jackson. *Enforcement of Maritime Claims* (4th ed. Lloyd's of London Press, 2006) 43-45.

¹⁵ Article 12, International Convention on Maritime Liens and Mortgages 1993.

¹⁶ *Ibid.*

justified.¹⁷ First of all, the court shall issue an announcement of ship auction after making the ruling of auction¹⁸. And then, creditors who have interests in the judicial auction of a ship shall apply to the court for registration of the claims within a certain period of time from the date of issuing the public announcement of the court¹⁹. At the meantime, the court will also examine the creditor's application to determine whether the registration of the claims should be allowed²⁰. Moreover, even if creditors applying for auction of the ship directly requests to participate in the distribution of the auction price of the ship without the registration of the claims, the court shall permit the request.²¹ Through due procedure, the issue of the protection of the security interest of the ship and the creditors' rights in principle of eliminating has been solved, and all the parties are able to be at the same level in the balance of interest.

C. Residue Principle

Residue principle is the combination of the above two modes. In legislative model of residue principle, only if the ship auction price can pay off all the priority claims of creditors (statutory priority claims) and the execution costs of forced auction, the ship has the qualified to be auctioned by the court. Through this way, it can be ensured that all the rights of the preferential creditors can be fully performed and protected. The advantage of residue principle is mainly the balancing of the interests of all the parties and helping to improve the overall benefits of judicial sale. In Japan, if there is no residual possibility of the lowest auction price after the payment of the execution procedure expenses and the priority claims of the creditors, or the creditor is unable to prove remaining possibility and fails to timely submit the corresponding application and guarantee, the court shall cancel the judicial auction.²² Germany is similar to it. In Germany, only if the auction price is sufficient to compensate all real rights, which take precedence over the claims of creditors, and the costs of the enforcement procedures, the court can permit to conduct the auction²³.

Combining with regulations mentioned above, it seems that residue principle is able to protect the interests and rights of all the parties. But if taking that whether the

¹⁷ Wu Shengshun, 'The Flaws and System Reconstruction of Procedures for Registering Creditors' Rights and Payment of Debt under the *Special Maritime Procedure Law of the People's Republic of China*' (2018) 29 *Chinese Journal of Maritime Law* 12.

¹⁸ Article 111, *Special Maritime Procedure Law of the People's Republic of China*.

¹⁹ *Ibid*, Article 113.

²⁰ *Ibid*, Article 114.

²¹ Article 18, *Provisions of the Supreme People's Court of the People's Republic of China on Several Issues Concerning the Application of Laws in Seizure and Auction of Ships*.

²² Article 63, *Civil Enforcement Law of Japan*.

²³ *Forced Auction and Forced Management of Germany*, Article 44, Paragraph 1 provides the minimum price of the auction (*geringstes Gebot*).

estimated auction price is sufficient to repay the priority claims as the condition of whether to conduct judicial auction, the corresponding procedural rights and substantive rights of the creditors whose order of priority is low are likely to be restraint.²⁴ In addition, it is difficult for the court to estimate the auction price exactly. It is stated that the difficulty can be solved by reserve price auction²⁵. That is setting an auction reserve price to ensure that all the debts attached to the ship can be paid off, or the reserve price is slightly lower than all the debts, and the final price through the bidding in the auction is also likely to finally achieve the effect of paying off all the debts. But a high reserve price is likely lead to abortive auction, especially when the debt attached to the ship is too huge. Furthermore, residue principle is more inclined to protect the priority claims, but ignores the protection of ordinary creditors' interest. In practice, there is the strong possibility that only the preferential creditor's rights can be paid off, and the ordinary creditors cannot be effectively paid off.

As principle of bearing is obviously contrary to the purposes of Beijing Draft, the judicial sale of ships adhering to the principle is not in the scope of application of the convention²⁶. As for judicial sales adhering to principle of eliminating, the purchaser can certainly acquire the clean title of the ship. And judicial sale in residue principle is unable to be conducted only if the ship auction price can pay off all the priority claims of creditor's and the execution costs of forced auction. Thus, it seems that Beijing Draft is definitely applicable to judicial sale adhering to principle of eliminating. However, according to Article 3 of Draft Convention on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft (hereafter called the Third Draft), not the application of Beijing Draft can lead the purchaser of judicial sale of ships obtain clean title, but the convention is enforceable to the judicial sale by which the purchaser obtains the clean title of the ship. In fact, during the drafting process, the legal effect of judicial sale in Beijing Draft has been considered. Annotated First Revision of the Beijing Draft (hereinafter called the First Draft) gave two alternative formulations of the issue. One is Article 3 of the Third Draft and that is the convention applies only to the judicial sale where the purchaser (has) obtained the clean title under the law of the State of judicial sale. The other is that all judicial sales apply to the convention lead to clean title of the ships, and considering how to incorporate into the convention those judicial sales which do not confer the purchaser a clean title under the law of the State of

²⁴ Xiang Minghua (note 11).

²⁵ Nie Shuheng, Fu Tingzhong (note 13).

²⁶ Article 3, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft.

judicial sale. Let alone that Beijing Draft was drafted for 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, different States choose different legislative models of legal effect of judicial sale and as the legislative models mentioned above, there are States which do not apply to principle of eliminating and not all purchasers can get clean title of ships through judicial sales. It is difficult to reach a unified perspective of clean title in all States, and it can only strive to reach a consensus to the possible extent. So the first formulation, which provides that Beijing Draft applies only to the judicial sale where the purchaser (has) obtained the clean title under the law of the State of judicial sale, is appropriate, and the Third Draft has also chosen it. However, the latest revision of the Beijing Draft has removed the conferral of clean title as a matter of scope.²⁷ Then, there comes an issue that whether a judicial sale has international effect if the purchaser is unable to obtain the clean title under the law of the State of judicial sale.

III. International effect of judicial sale of ships: what conditions should be met?

After the judicial sale which confers clean title to the ship on the purchaser becomes effective in the State of judicial sale, there are further issues like the registration and deregistration of the ship affect the interest of every party. As ships, especially the ship engaged in international shipping, have international mobility, the creditors of the rights attached to the ships are likely in various States, and the courts of judicial sales, the authorities of registration and deregistration are also likely in different States. In the situation, if the State of deregistration or/and registration or/and the creditor refuses to recognition an effective judicial sale conducted in another State, the purchaser's right is certainly derogated. Therefore, no sovereign State can compel another State to recognize its judicial sale, and each State reserves the power to recognize the legal effects of the judicial sale of ships.²⁸ For example, the *Galaxias* was sold through judicial sale of the court of Canada and "free and clear of all encumbrances"²⁹. The Minister of Merchant Marine in Greece claimed that title of the *Galaxias* is unable to be transferred without considering the right registered in the Greek Shipping Registry in Piraeus. And the Minister objected to the issuance of the necessary

²⁷ Article 3, Draft Instrument on the Judicial Sale of Ships: Annotated Fifth Revision of the Beijing Draft.

²⁸ Lief Bleyen. *Judicial sales of ships: A Comparative Study* (Springer International Publishing, 2016) 147.

²⁹ *The "Galaxias"* [1988] 240 LMLN 2.

Deletion Certificate.³⁰ For the attitude of the Minister, the Canadian court indicated that although the court desired and expected that the courts and governments of other nations would respect their orders and judgments, particularly in the area of maritime law, the court cannot control it “if there were other jurisdictions which would ignore the effect of the judicial sale in Canada”³¹.

In the absence of international conventions of recognition of judicial sale of ships, the recognition and enforcement of judicial sales of ships is based on the “principle of comity”³². The recognition and enforcement which is based on the “principle of comity” depends entirely on the domestic law of the State. Some States have complete domestic law provisions on the recognition and enforcement, but most countries have no relevant legislation, but solely in the discretion of the judges, which leads to legal uncertainty concerning the international recognition of the judicial sale of ships. Thus, in order to ensure the purchaser to obtain stable title of the ship, the legal effect of judicial sale needs to extend to other States. And that is one of the purposes of Beijing Draft.

The fundamental purpose of Beijing Draft is to ensure that judicial sales of ships conducting in a contracting State have the same legal effect in other contracting States, so it is no doubt as a fundamental principle of the convention. The principle embodies the purpose and necessity of drafting the convention as there is no international convention specifically to the judicial sale of ships and its recognition, and the problem of international recognition of the judicial sale of ships is widespread³³. However, the meanings of international effect and international recognition of judicial sale of ship are confusing. At first, Beijing Draft used the word “recognition”³⁴. But Annotated Second Revision of the Beijing Draft (hereinafter called the Second Draft) changed “recognition” to “International Effect” and the change lead to discussions. Therefore, it is necessary to figure out the question that whether international effect is equal to recognition of judicial sale and which words, “international effect” or “recognition” should be used in the formulation of Beijing Draft. First of all, it is clearly that international effect of judicial sale of ships id different from recognition of judicial sale. The judicial sale’s international effect is that the judicial sales of ships in a contracting Sate have the same legal effect in other contracting States. As the purchaser obtains

³⁰ Ibid.

³¹ Ibid.

³² Danielle Ireland-Piper, ‘Outdated and Unhelpful: The Problem with the Comity Principle and Act of State Doctrine’ (2018) 24 *Australian International Law Journal* 15.

³³ Fan Xiaobo, Li Qian. ‘Comments from the International Community on the Second Working Draft on the Instrument on Recognition of Foreign Judicial Sales of Ships’ (2014) 2014 *China Oceans Law Review* 217.

³⁴ Article 7, Judicial Sale of Ships: Proposed Draft Instrument Prepared by the Comité Maritime International.

clean title of the ship in the State of judicial sale, the purchaser's clean title is valid in other contracting States. Although it seems that the outcome of recognition of judicial sale is the same as international effect of judicial sale, the process of recognition of judicial sale is really different. Comparing with international effect of judicial sale of ship, recognition of judicial sale needs the court of a State party, on the application of a purchaser or subsequent purchaser, to recognize a judicial sale conducted in any other contracting State, in order to realize the effect 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 extinguished³⁵. In another words, the purchaser or subsequent purchaser has to apply to get recognition of the judicial sale. If Beijing Draft uses the words "recognition of judicial sale", it is unable to realize the fundamental purpose. Because the purchaser is unable to know clearly which States are the creditors or other third parties, who has the rights attached to the ships, are located in, and asking the purchaser to apply for recognition to the courts in all contracting States is unpractical and wasteful. In addition, giving international effect to judicial sales of ships conforms to protection of vested right principle. The clean title of the ship obtained by the purchaser is a vested right and should be recognized by other States. Thus, the Third Draft using "international effect of judicial sale" is appropriate. While giving international effect to judicial sale of ships and protection to the purchaser, rights of other interested persons and power of contracting States are necessary to be respected and protected. Therefore, to get international effect, a judicial sale has to match some conditions.

Before discussing the conditions for judicial sale of ships to get international effect, another question needs to be figured out is whether international effect of judicial sale is the same as legal effect of judicial sale. The question is significant to define the content of Beijing Draft. Actually, whether a judicial sale gets legal effect and whether a judicial sale gets international effect are two issues. Getting effective is a prerequisite to obtaining international effect. The main consideration of whether the ship judicial sale can obtain international effect is whether the effect of judicial sale can be applied to the States other than the State of judicial sale. The matters need to review are whether the effects of the ship judicial sale conform to the national internal public order, and whether there is fraud in it. And if the procedure or the enforcement arrangement of the judicial sale does not meet the relevant effective elements, the judicial sale is invalid,

³⁵ Ibid.

and it will not develop to the stage of considering whether the effect of judicial sale is able to extend to other States. In practice, courts in most States prefer to recognize the legal effect of foreign judicial sale of ships according to the rules of conflicts. The courts do not apply their own internal laws to judge whether judicial sales in foreign States are effective. In the case of *Castrique v Imrie*, the English court stated that the judicial sale of ship in France was conducted according to French law³⁶. The application of French law was in accord with law of the application of law. And as the judicial sale complies with the French law and got effective in France, the legal effect of the judicial sale in England is the same as it in France³⁷. The Amsterdam District Court in the case of *Esquire Management Co. v. ETA Petrol Akaryakıt Ticaret ve Nakliyat A.S.* made the same conclusion. In this case, the court concluded that “since the judicial sale of ‘The Katerina’ took place in China under Chinese law, the effects of that sale regarding the property of the ship are determined in accordance with Chinese law”³⁸. Thus, the rule that the law governing the transfer of moveable property (including ships) is *the lex situs*,³⁹ and that means legal effect of a judicial sale and the conditions to get the legal effect should be decided by the law in the State of judicial sale rather than international conventions or foreign laws. After a judicial sale gets legal effect according to the law of the State of judicial sale, the issue that whether the sale is effective in other States needs to be considered.

In addition, Beijing Convention is drafted for stipulating how judicial sale of ships can get international effect rather than impacting national legislations for the legal effect of judicial sale. In other words, the legal effect and the conditions to realize the legal effect has been and should be stipulated by national legislation, and the convention is able to provide the minimum requirements of effectiveness of judicial sale. The international effect and how judicial sale of ships can realize the international effect are the main contents of Beijing Convention. So the Second Draft deleted the formulation about “Effects of judicial sale in the State of judicial sale [in this State]” in the First Draft is reasonable⁴⁰. Based on clarity of the fact, following discussion concentrates

³⁶ *Castrique v Imrie* [1870] 4 WLUK 429.

³⁷ *Ibid.*

³⁸ Case No. KG04/912P, *Esquire Management Co. v. ETA Petrol Akaryakıt Ticaret ve Nakliyat A.S.* (2004) Amsterdam District Court. See commentary in Lief Bleyen, *Judicial Sales of Ships: A Comparative Study* (Springer, 2016), page 95. “De slotsom van het voorgaande is dat, nu de veiling in China volgens Chinees recht heeft plaatsgevonden, op de gevolgen van die veiling ten aanzien van de eigendom van het schip Chinees recht van toepassing is”.

³⁹ *Bridge Oil Limited v. Fund Constituting the Proceeds of the Sale of the MV “Mega S”* [2003] ZAWCHC 24.

⁴⁰ Paragraph 1, Article 4, Draft Instrument on the Judicial Sale of Ships: Annotated First Revision of the Beijing Draft,:

upon the conditions for a judicial sale of ship to get the international effect. The discussion will take place from two perspectives, one is the conditions that judicial sales can acquire international effect and the other is the conditions that a contracting State can refuse to recognize the international effect.

A. Circumstances in which judicial sale has international effect

A condition in the Third Draft for a judicial sale to get international effect is that the judicial sale should be conducted in accordance with the notice requirements in article 4^{41,42}. According to the article 4, a notice of judicial sale must be given to six kinds of persons, and they are the registrar of the registry of ships or equivalent registry in which the ship is registered, all holders of any mortgage or registered charge, all holders of any maritime lien, the owner of the ship for the time being, the person registered as the bareboat charterer of the ship in the registry of ships in which the ship is registered, and the registrar of the registry of ships in any State in which the ship is granted bareboat charter registration. Those persons are important interested ones of judicial sale, especially the owner of the ship for the time being and the person registered as the bareboat charterer of the ship in the registry of ships in which the ship is registered. Without notice to those persons, their interests are likely to suffer damage because of judicial sale. It has been proposed the Convention should provide that if the owner of the ship for the time being or/and the person registered as the bareboat charterer of the ship in the registry of ships is/are not notified, the judicial sale should be

“In the event of a judicial sale of a ship in a State Party [this State], all mortgages and charges[, except those assumed by the purchaser,] shall cease to attach to the ship [and clean title to the ship shall be acquired by the Purchaser], provided that:

- (a) The ship was physically within the jurisdiction of the State of judicial sale [this State] at the time of the sale; and
- (b) The judicial sale was conducted in accordance with the law of the State of judicial sale [this State] and the notice requirements in article 3.”

And Draft Instrument on the Judicial Sale of Ships: Annotated Second Revision of the Beijing Draft removes this formulation

⁴¹ Paragraph 1, Article 4, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft:

“Prior to a judicial sale of a ship, a notice of the sale shall be given to:

- (a) The registrar of the registry of ships or equivalent registry in which the ship is registered;
- (b) All holders of any mortgage or registered charge, provided that the registry in which it is registered, and any instrument required to be registered with the registrar under the law of the State of the registry, are open to public inspection, and that extracts from the registry and copies of such instruments are obtainable from the registrar;
- (c) All holders of any maritime lien, provided that they have notified the court or other authority conducting the judicial sale of the claim secured by the maritime lien [in accordance with its regulations and procedures];
- (d) The owner of the ship for the time being;
- (e) The person registered as the bareboat charterer of the ship in the registry of ships in which the ship is registered; and
- (f) The registrar of the registry of ships in any State in which the ship is granted bareboat charter registration.”

⁴² Article 6, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft: “A judicial sale to which this Convention applies that is conducted in one State Party shall have the effect in every other State Party of conferring clean title to the ship on the purchaser, provided that the judicial sale was conducted in accordance with the notice requirements in article 4.”

invalid⁴³. The proposal has been argued by many States. The States suggest that the problem be left to the resolution of internal laws⁴⁴. As a procedural provision, different States make it according to different national conditions. Reserving the power of internal law to stipulate provisions of notice of judicial sale is conducive to coordinating the unity of the will of all States to the greatest extent. However, notice of judicial, as an important part of the protection of procedural justice, is an indispensable condition for determining the effectiveness of the judicial sale of ships. To avoid conflict with internal laws of contracting States, the Convention provides the provision of notice as the requirement of international effect of judicial sale is reasonable.

In addition to the condition mentioned above, the Second Draft provides other two conditions for a judicial sale to acquire international effect. One is that the ship was physically within the jurisdiction of the State of judicial sale at the time of the sale, and the other is that that the judicial sale was conducted in accordance with the law of the State of judicial sale.⁴⁵ It was argued that the first condition already served to define the scope of application of the draft convention⁴⁶ and was therefore superfluous.⁴⁷ As for the second condition, if international effect of judicial sale is challenged based on non-compliance with the law of the State of judicial sale, ascertainment of foreign law is needed and the responsibility of ascertainment of foreign law needs to be determined. In addition, the condition involves matters that fall within the exclusive jurisdiction of the courts of the State of judicial sale under article 9⁴⁸ and should therefore not be

⁴³ Li Xinwei, Chu Beiping, 'The Key Issues on the Drafting of an International Convention on Judicial Sale of Ships' (2020) 31 *Chinese Journal of Maritime Law* 94.

⁴⁴ Working Group VI of United Nations Commission on International Trade Law, 'Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-sixth session' (2 December 2019) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V19/114/57/PDF/V1911457.pdf?OpenElement>> accessed 6 February 2022.

⁴⁵ Paragraph 1, Article 6, Draft Instrument on the Judicial Sale of Ships: Annotated Second Revision of the Beijing Draft:

"A judicial sale to which this Convention applies that is conducted in one State Party shall have the effect in every other State Party of conferring clean title to the ship on the purchaser [, provided that:

- (a) The ship was physically within the jurisdiction of the State of judicial sale at the time of the sale; and
- (b) The judicial sale was conducted in accordance with the law of the State of judicial sale and the notice requirements in article 4.]"

⁴⁶ Article 3, Draft Instrument on the Judicial Sale of Ships: Annotated Second Revision of the Beijing Draft:

"This Convention applies only to a judicial sale of a ship if:

- (a) The ship was physically within the jurisdiction of the State of judicial sale at the time of the sale; and
- (b) Under the law of that State, the judicial sale confers clean title to the ship on the purchaser."

⁴⁷ Working Group VI of United Nations Commission on International Trade Law, 'Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-seventh session' (29 December 2020) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V21/005/89/PDF/V2100589.pdf?OpenElement>> accessed 1 March 2022.

⁴⁸ Paragraph 1, Article 9, Draft Instrument on the Judicial Sale of Ships: Annotated Second Revision of the Beijing Draft: "The courts of the State of judicial sale shall have exclusive jurisdiction to hear any claim or application to avoid a judicial sale of a ship conducted in that State or to suspend its effects, which shall extend to any claim or application to challenge the issuance of the certificate of judicial sale referred to in article 5."

scrutinized by a State other than the State of judicial sale.⁴⁹ Therefore, the two conditions have been deleted.

B. Circumstances in which judicial sale has no international effect

According to the Third Draft, “a judicial sale of a ship shall not have the international effect in a State Party other than the State of judicial sale if a court in the other State Party determines that the effect would be manifestly contrary to the public policy of that other State Party.”⁵⁰ The requirement of compliance with public policy of contracting States is conducive to protect the interests of the contracting States and the citizens in the States. In addition, it has been generally accepted to retain a condition for refusal of international effect based on public policy⁵¹. It should be noted that the concept of being “manifestly” contrary to public policy has appeared in instruments on the recognition of foreign judgments, including the Convention on Choice of Court Agreements⁵² and the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters⁵³. Thus, as public policy is a common feature of conventions establishing recognition regimes, including the condition is likely to assist in gaining acceptance of the instrument.

In the Second Draft, in circumstances that the ship was not physically within the jurisdiction of the State of judicial sale at the time of the sale, and the sale was procured by fraud committed by the purchaser, a judicial sale of a ship shall not have the international effect. The first one has been discussed above and it is concluded that the provision of this condition is superfluous. Thus, the deletion of the condition in the Third Draft is reasonable. As for fraud committed by the purchaser, there is perspective that fraud can also trigger the public policy ground and that, therefore, a separate condition for refusal based on fraud can be omitted.⁵⁴ However, retaining fraud as a

⁴⁹ Working Group VI of United Nations Commission on International Trade Law, (note 47).

⁵⁰ Article 10, Draft Instrument on the Judicial Sale of Ships: Annotated Second Revision of the Beijing Draft.

⁵¹ Working Group VI of United Nations Commission on International Trade Law, (note 44).

⁵² Article 6, Convention on Choice of Court Agreements:

“A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless

(c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;”

⁵³ Paragraph 1, Article 7, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters:

“Recognition or enforcement may be refused if

(b) the judgment was obtained by fraud;

(c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;”

⁵⁴ Working Group VI of United Nations Commission on International Trade Law, (note 47).

separate condition has merit as it is clearer than public policy.⁵⁵ And with the text of the condition, the interests of interested persons other than the purchaser is able to get protection when a fraud committed by the purchaser. In addition, it should be noted that both the concept of being manifestly contrary to public policy and the concept of fraud have appeared in the same instruments⁵⁶. That indicates that the concept of being manifestly contrary to public policy and the concept of fraud do not coincide. Moreover, the perspective of retaining the text of fraud committed by the purchaser has gained general support.⁵⁷ Thus, although the Third Draft deleted the text of fraud, the text of fraud committed by the purchaser is recommended to be retained.

Conclusions

As a juristic act, nature of judicial sale of ships is specific for it originates from the right of disposal in public law, and still has the nature of sales transaction in civil law. And different cognitions of nature of judicial sale lead to different cognitions of legal effect of judicial sale. In practice, different international covenants and national legislations choose different legislative models of legal effect of judicial sale of ships, and they are principle of bearing, principle of eliminating, and residue principle. It is difficult to reach a unified perspective that a judicial sale must confer the purchaser a clean title in all States, and Beijing Draft can only strive to reach a consensus of the legal effect of judicial sale of ships to the possible extent. Under this circumstance, the formulation in the Third Draft that it is enforceable to the judicial sale by which the purchaser obtains the clean title of the ship is appropriate.

As for the issue of international effect of judicial sale of ships, it is worth noting firstly that legal effect of judicial sale and international effect are two matters. Getting effective is a prerequisite to obtaining international effect. The legal effect and the conditions to realize the legal effect has been and should be stipulated by national legislation, and the international effect and how judicial sale of ships can realize the international effect are the main contents of Beijing Draft. Considering that notice of judicial, as an important part of the protection of procedural justice, is an indispensable condition for determining the effectiveness of the judicial sale of ships, the condition that a judicial sale of ship has international effect is that the judicial sale was conducted in accordance with the notice requirements in Beijing Draft. For protection of the

⁵⁵ Working Group VI of United Nations Commission on International Trade Law, (note 44).

⁵⁶ Article 7, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

⁵⁷ Working Group VI of United Nations Commission on International Trade Law, (note 44).

interests of the contracting States and the citizens in the States, the sale which would be manifestly contrary to public policy has no international effect. In addition, to protect interested persons other than the purchaser, the sale which was procured by fraud committed by the purchaser also has no international effect.