(To be presented at the Joint Meeting of CMI and USMLA, New York, May 2016)

**The CMI Draft Convention on Recognition of Foreign Judicial Sales of Ships**

– The Journey thus far

By Jonathan Lux[[1]](#footnote-2)\*

The draft International Convention on Foreign Judicial Sales of Ships and their Recognition (known as the "Beijing draft") can be found at the CMI website[[2]](#footnote-3). In the limited time allotted to me I will set out: –

– Introduction

– Why a new Convention is needed

– The substance of the draft Convention

– A summary of the work to date

– Conclusions

**INTRODUCTION**

The CMI is the oldest international organisation exclusively concerned with the unification of Maritime law and related shipping practice. In 1897 the partnership between the Belgian government and the CMI resulted in the famous series of "Brussels Diplomatic Conferences on Maritime Law ". In the last 100 years the CMI has made an outstanding contribution to the unification of maritime law throughout the world. The most well-known international maritime conventions emanating from the CM I include The Hague Rules 1924, the Collisions Convention 1910, the Arrest Convention 1952, et cetera.

The CMI had its 41st International Conference in Hamburg in June 2014 and produced a draft International Convention on Foreign Judicial Sales of Ships and their Recognition. This is probably the CMI's most important work product since the Outline Instrument for the Rotterdam Rules. In the Resolution adopted at the CMI Assembly, it is stated that: –

"The CMI approves the text of the draft International Convention on  Foreign Judicial Sales of Ships and their Recognition (known as the "Beijing draft") for submission to such appropriate inter-governmental or international organisation, as the CMI Executive Council thinks appropriate, for its consideration and adoption – – ".

The cooperation between the CMI and the IMO Legal Committee dates from the stranding of the "Torrey Canyon" in March 1967. From that time onwards the cooperation between the two bodies has been continuous and many important Conventions have resulted, including the Athens Convention 1974, the LLMC 1976 and the Salvage Convention 1989. In addition, the CMI has also prepared draft Conventions for consideration jointly by IMO and UNCTAD, including the Maritime Liens and Mortgages Convention 1993 and the Arrest Convention 1999.

**WHY A NEW CONVENTION IS NEEDED**

1. To solve certain practical problems.

There are numerous Court cases illustrating the practical problems and these include:

– The purchaser may encounter difficulty in deleting the vessel acquired at judicial sale from her previous register and then registering the vessel in a register of his choice;

–The purchaser's title to the vessel may be challenged by the previous shipowner in another jurisdiction, resulting in the vessel being arrested;

– The purchaser may be called upon in another jurisdiction to defend historical claims which arose before the judicial sale, whether or not secured by a maritime lien or mortgage.

1. To fill the gap left by the MLM Convention 1993.

MLM has unfortunately not been widely accepted. Secondly, it is far more narrow in scope than the new Convention which extends to other types of maritime claims, such as those for loss of or damage to cargo or for unpaid supplies to ships. Further, there is a necessity to deal expressly with recognition of foreign judicial sales.

1. To satisfy the needs of the Maritime industry and ship finance.

The issues and concerns are spelt out in the Preamble to the draft Convention and I quote: –

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

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

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

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

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

**THE SUBSTANCE OF THE DRAFT CONVENTION**

I think you will find that the draft Convention deals with these issues in a clear and straightforward manner. It has the second great merit that it is only just over seven pages long!

Art. 1 contains 22 definitions and I will refer now only to definition 8 : –

""Judicial Sale" means any sale of a Ship by a Competent Authority by way of public auction or private treaty or any other appropriate ways provided for by the law of the State of Judicial Sale by which Clean Title to the Ship is acquired by the Purchaser and the proceeds of sale are made available to the creditors".

Art. 2 sets out the Scope of Application. A State Party commits to recognise a Judicial Sale in another State, whether a State Party or not but has the right under Art. 9 to restrict recognition to Judicial Sales in State Parties.

Art. 3 regulates the Notice of Judicial Sale. The key points in Art. 3 are these: –

First, the notice of judicial sale should be given to the listed addressees, including the registrar of the ship's register in the state of registration.

Secondly, the required notice is to be given at least 30 days prior to the judicial sale and is to contain certain minimum information.

Thirdly, the required notice is to be in writing and is to be given in such a way as not to frustrate or significantly delay the proceedings concerning the judicial sale.

Art. 4, Effect of Judicial Sale, is both short and clear and I quote para 1: –

"Subject to:

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

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

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

Clean title, of course, is the very crux of the Convention.

Art. 5 provides for the issuance of a Certificate of Judicial Sale. Subject to the conditions set by the State of Judicial Sale and by the Convention being met, the Purchaser gets a Certificate which has important effects.

Art.6 deals with the Deregistration and Registration of the Ship. Basically, the Article 5 Certificate is the trigger to enable the Purchaser to have the Ship deregistered and then registered in the jurisdiction of his choice.

Art. 7 (Recognition of Judicial Sale) goes to the heart of the matter and is structured in this way: –

– if the Purchaser produces the Article 5 Certificate then the State Party must recognise the Judicial Sale, subject only to Article 8.

– If the vessel is arrested then the arrest must be set aside once the Article 5 Certificate is produced. The only exception is where the arrest is by an "Interested Person" who can bring himself within Article 8. "Interested Person" is defined as "---the Owner of a Ship immediately prior to its Judicial Sale or the holder of a registered Mortgage/Hypotheque or Registered Charge attached to the ship immediately prior to its Judicial Sale".

– legal proceedings seeking to challenge the Judicial Sale can only be brought in a competent Court of the State of Judicial Sale.

– none other than an Interested Person can challenge the Judicial Sale and the competent Court of the State of Judicial Sale shall only entertain an action by an Interested Person.

– the Art. 5 Certificate is conclusive absent proof of a circumstance within Art. 8.

Art. 8 sets out: Circumstances in which Recognition of a Foreign Judicial Sale may be Suspended or Refused. Importantly, the only person who can challenge the Judicial Sale is an Interested Person and the only basis to do so is in Art. 8.

The Article 8 grounds are these: –

– If the Ship was not physically within the jurisdiction of the State of Judicial Sale at the time of the Judicial Sale.

– If an Interested Person has brought proceedings and a competent Court of the State of Judicial Sale has suspended or nullified the Judicial Sale.

– If recognition would be manifestly contrary to the public policy of the State Party.

Finally, Article 10 (I have referred to Article 9 above) deals with Relations with other International Instruments. It states in the clearest of terms that nothing in this Convention shall derogate from any other basis for the recognition of judicial sales under any other bilateral or multilateral Convention, instrument or agreement or principle of comity.

**A SUMMARY OF THE WORK TO DATE**

Let us look briefly at the history of the draft Convention and the extensive discussion which has taken place.

To summarise, the project was conceived in 2008. The CMI International Working Group comprised 11 members from 11 different jurisdictions. A comprehensive questionnaire was drafted and sent out to all CMI members. In the seven years between 2008 and 2014 there have been intensive meetings and discussions

 in Buenos Aires, Oslo, Beijing, Dublin and Hamburg and a total of five drafts before arriving at the final version approved by the CMI Plenary in Hamburg in June 2014. At the Plenary 24 National Maritime Law Associations voted in favour of the draft Convention, there were 2 abstentions and non-against.

I have already referred to the long and close relationship between IMO and CMI. In January 2015 the International Working Group (IWG) was tasked to prepare an 'information paper' for submission to the IMO Legal Committee for inclusion in the agenda of LEG 102nd Session (document LEG 102/11/2) which took place in April 2015.

In fact, a more extensive pack was delivered by CMI to IMO in preparation for the Legal Committee session comprising: –

– The information paper;

– The draft Convention;

– The paper presented by the Chair of the IWG, Henry Hai Li, at the CMI Conference in Athens in 2008;

– The paper presented by the former Secretary General of CMI, Nigel Frawley, setting out the long-standing relationship between IMO and CMI.

Henry Hai Li (Chair of the IWG), Jonathan Lux (Rapporteur) and Patrick Griggs (CMI representative to IMO) attended IMO LEG 102nd Session and presented the draft Convention and answered far-reaching questions from a large number of national delegations. It became apparent that, for the draft Convention to be taken up by the IMO, the following must be attended to: –

– one or more State sponsors will be needed to sponsor or co-sponsor the proposal to the IMO Legal Committee;

– the IMO Legal Committee remains to be convinced that it is indeed within its competence to develop the draft instrument into a Convention; and

–a number of delegates expressed concern that the "compelling need" for a new Convention has not yet been fully established.

These issues are being addressed and will no doubt be commented on by my Co-Rapporteur, Andrew Robinson, who will address you on "the way forward ".

**CONCLUSIONS**

I hope to have explained the issues which gave rise to the need for a new Convention, the manner in which the draft CMI Convention deals with those issues and the steps which have been taken since approval of the draft Convention by the CMI. Whilst there may still be some way to go before the draft Convention is adopted by the IMO and/or by some other international organisation, I confidently predict that we have at least reached the end of the beginning and certainly not the beginning of the end!

1. \* Jonathan Lux, the Rapporteur of CMI International Working Group on Recognition of Foreign Judicial Sales of Ships. [↑](#footnote-ref-2)
2. http://comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/0,2750,15032,00.html [↑](#footnote-ref-3)