

THE CMI QUESTIONNAIRE IN RESPECT OF RECOGNITION OF FOREIGN JUDICIAL SALES OF SHIPS

COMMENTARY ON ANSWERS TO THE 5TH GROUP OF QUESTIONS

1. GENERAL COMMENTS

1.1 The 5th Group of questions in the Questionnaire considers three issues:

1.1.1 Two questions regarding case law where the judicial sale of ships has been challenged either in the jurisdiction where the ship has been sold, or in some foreign jurisdiction;

1.1.2 Three questions dealing with the provisions in Articles 11, 12.1 and 12.5 of the International Convention on Maritime Liens and Mortgages, 1993 [“the Convention”];

1.1.3 A final question asks that the National Associations whether it is necessary to have a separate international instrument, such as a Convention, to deal specifically with issues arising out of the recognition of foreign judicial sales of ships.

1.2 The IWG received replies from 19 Maritime Law Associations. I have categorised the responses in the schedule attached hereto marked “A”, although it is important to note that in many cases the answers were qualified, particularly where jurisdictions were not a party to the Convention and their domestic legislation did not accord with the provisions set out in the Conventions.

1.3 For ease of reference I have included Articles 11 and 12 of the Convention as annexures “B” and “C” to this paper as many members may not be familiar with the provisions contained therein.

2. COMMENT ON RESPONSES

2.1 CASE LAW

Questions 5.1 and 5.2 sought to elicit from the Associations examples of the judicial recognition, or otherwise, of the consequences of a judicial sale both where the

judicial sale has been challenged in the jurisdiction where the sale is taking place, and where the judicial sale took place or is challenged in other jurisdictions.

Although it would appear that in many Associations an exhaustive review of the case law was not undertaken, our comment is that there are surprisingly few instances where the consequences of judicial sales have been challenged and in none of the examples provided was a single challenge successful.

2.2 **ARTICLE 11 OF THE CONVENTION**

The third question related to the provisions of Article 11 of the Convention. This Article deals with the question of notice.

Our comment on the responses received suggest that there is a general view that notice should be given either to the relevant authority of the Flag State, or to the Consul of the Flag State. It was also felt that the method of such notice should be particularised (i.e. by some specific electronic means) and that the 30 day notice period could be substantially reduced so as not to unnecessarily delay the sale of the ship.

2.3 **ARTICLE 12.1 OF THE CONVENTION**

Article 12.1 sets out the two conditions that must be met so that the registered mortgages, charges, liens and other encumbrances attached to a ship will be extinguished after the forced sale.

The general view was that the provisions were appropriate; some States wishing to restrict the notice requirement to that of the Consul of the Flag State only.

2.4 **ARTICLE 12.5 OF THE CONVENTION**

Article 12.5 deals with the issue of the Certificate by the Court conducting the judicial sale and the deregistration and registration of the sold ship. Again there was a general view that the provisions in that Article were appropriate.

2.5 **SEPARATE INTERNATIONAL INSTRUMENT**

Finally, the IWG asked the question whether it was necessary to have a separate international instrument to deal with issues regarding the recognition of foreign judicial sales of ships.

There was no consensus on this issue with approximately half of the Associations supporting the notion that there should be some form of international instrument dealing with the question of judicial sales and their recognition.

Some Associations regarded the Convention as being a failure given the lack of support that the Convention has received. Some view the Convention as being adequate, whilst others believe it is only partly adequate and would benefit from a suitably constructed Protocol. Other Associations believe that a completely separate instrument would be useful.

3. **CONCLUSION**

There appears to be a general consensus that the current provisions contained in the Convention are not altogether adequate. Whilst Associations who were not parties to the Convention expressed satisfaction with their own domestic legislative provisions dealing with judicial sales (whether or not they were more or less in line with the provisions of Articles 11 and 12 of the Convention) my concluding comment would be that the wide variety of different approaches to judicial sales and their consequences would suggest that there is a need for an international instrument that would attract the support of a wider

range of States - especially those that do not support the Convention given the content of other provisions of that Convention.

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