

INTERNATIONAL WORKING GROUP
ON THE PREPARATION OF THE PROPOSED DRAFT INTERNATIONAL
CONVENTION ON RECOGNITION OF FOREIGN JUDICIAL SALES OF SHIPS

FOR CONSIDERATION BY THE DELEGATES TO THE CMI CONFERENCE:
HAMBURG 2014

UNITED KINGDOM COMMENTS

The current draft shows the good work done by the Committee following the Dublin meeting.

The UK does not have any major issues of principle, and can make its remarks briefly, although an issue about notification of sales is raised by a recently reported English case.

The UK does not propose to remark on all issues of definition, but considers there are areas of overlap and repetition.

First preamble: query the words “*securing and enforcing*”.

Suggest: “*is an effective way of maximising the recovery available for the payment of maritime claims, and the enforcement of judgments etc*”.

Article 1 – Definitions

2. “*Charge*”.

- (1) The UK remains uncertain what is intended by “*notice of interest*”. If it refers to a notice appearing on the ship’s registration, perhaps that should be expressed. We feel it should either be defined to mean a claim to ownership of the ship in legal proceedings, or it should be deleted.
- (2) Also we consider this definition could be adopted elsewhere so that any transfer of Clean Title would simply be free of all Mortgages and Charges. The definition “Clean Title” need only refer to “Mortgages and Charges” and Articles 4.1(b), 5.1(a) and 7.1(b) etc could be simplified

4. “*Competent Authority*”.

Our concern here is that this is defined as any "*Person or authority*" and this would include (for example) a port authority selling a ship without any judicial process. We would prefer the definition to be limited to a Court, or a person appointed or authorised by the Court, to sell the ship.

8. “*Judicial Sale*”.

(1) It will never be the case that “*the [entirety of] the proceeds of sale are made available to the creditors*”. The cost of maintaining the vessel and the costs of the sale will always be paid out of the fund before it is distributed to creditors. If the definition implies that ALL proceeds are to be distributed, it may need alteration.

(2) If the meaning of “*Competent Authority*” is as wide as we suggest above, then “*Judicial Sale*” will include other types of disposal of a vessel – forfeiture by the State; sales by liquidators or administrators etc.

10. “*Mortgage*”.

The English rule concerning title to moveables is that proprietary rights are to be determined according to the law of the *situs* (which, in the case of an arrested ship with be the law of the State of Judicial Sale) without reference to the choice of law or private international law rules of the *situs*. This is a difficult area: see for example “*WD Fairway*” [2009] 2 Lloyd's Rep 191 (para 82) and *Blue Sky One Ltd v P.K. Airfinance U.S. Inc.* [2010] EWHC 631 (Comm). However the reference to private international law in the definition would go against the tide of English law.

13. “*Purchaser*”.

Might it be tidier to include a Subsequent Purchaser in this definition?

Article 3 – Notice of Judicial Sale

1. Might there be an exception in the case of fast-track sales or sales in an emergency?

The normal procedure for conducting a judicial sale in England is as set out in the note we presented at Dublin. There have, however, been a number of attempts to

persuade the court to approve as a judicial sale what is in reality a private sale. This was rejected by Sheen J in the *APJ Shalin* [1991] 2 Lloyd's Rep 62, but recently further attempts have been made.

In *The Bank of Scotland Plc v the Owners of the "Union Gold"* [2013] EWHC 1696 Adm, [2014] 1 Lloyd's Rep 53 such an attempt was again rejected:

*"The concerns which I have expressed strongly suggest that it is wrong in principle for the court to depart from the usual order that the Marshal sell a vessel by appraisal, advertisement and inviting bids to purchase the vessel. It was submitted on behalf of the bank that the court should accede to an application that the Marshal sell to a named buyer at a named price where there was evidence that the price is at or about the market value of the vessel. However, the buyer has been found by the bank and the market has not been tested by advertisement and invitations to bid. The difficulty with acceding to the bank's submission is that it may give the impression that the Marshal is acting for a particular claimant in rem rather than as an officer of the court who must have regard to the interests of all claimants in rem and of the defendant shipowner. This concern is reflected in *The APJ Shalin* and in *The Halcyon the Great*. In the former Sheen J expressed the concern that private sales "would be open to abuse" (at page 67 col 2) and in the latter Brandon J said that "it is important that the reputation of the Admiralty Court for impartiality in these matters should not be tarnished in any way" (at page 527 col 2). I have therefore concluded that, as a general principle, an order should not be made that the Marshal sell to a buyer found by the arresting party notwithstanding that the proposed price appears to be at or about the market value of the vessel."*

But that applied only to three of the four vessels that were the subject of the action.

The judge *did* allow the fourth vessel to be sold in this fashion:

"What does distinguish Union Pluto from the other vessels is the circumstance that the proposed buyer has a particular reason to buy this vessel and that unless a sale takes place immediately there is a risk that that reason will disappear. That risk is illustrated by the threat to the jobs of the crew and shore-based personnel. An elderly and very small commercial vessel is unlikely to attract other buyers at a price near to that which Angel Shipping is willing to pay. These matters persuaded me that, exceptionally, it was appropriate to permit the Marshal to sell the vessel to Angel Shipping Ltd at the price of €329,000 without an appraisal by the Admiralty Marshal. Given the need for an exceptionally prompt sale of Union Pluto and the insistence by the court on a conventional and regular sale of the other three vessels by the Admiralty Marshal, following appraisal, advertisement and invitations to bid, there is no real risk that the court's reputation for impartiality will be tarnished by permitting the Marshal to sell Union Pluto to a named buyer at a named price."

The sale of the fourth vessel in that case would not satisfy the tests for recognition in the current draft convention.

3. The (normal) English system anticipates the tender of sealed bids, the highest of which will be accepted provided it is in line with the valuation the Admiralty Marshal will have obtained prior to the sale.

In the event the best bid falls below the valuation, there will be a re-consideration – the best bid might be accepted nonetheless, or there could be another round of inviting sealed bids. Ditto if the successful bidder fails to complete the purchase.

In such circumstances would the notification process need to be repeated? The UK would hope not and that the original notification of the process was sufficient.

Article 4 – Effect of Judicial Sale

1. Why not use the definition of Clean Title, alternatively why not use this text as the definition of Clean Title?
2. What is the purpose of the phrase “*in accordance with law applicable*”? Is it necessary at all? In any event, it is surely the law of the State of Judicial Sale.

Article 5.1(a) – Issuance of Certificate of Judicial Sale

Why not “*with Clean Title*”? [The wording is not quite the same as Article 4.1, and is substantially different from the definition of Clean Title].

[A similar comment might be made in relation to Article 7.1(b).]

Article 7 – Registration of Judicial Sale

Are paragraphs 7.2 and 7.4 not repetitious?

Alternatively, should paragraph 7.4 say that no person other than Interested Person can take any action challenging a Judicial Sale, not only in the Courts of the State of Judicial Sale, but anywhere else?

Article 8 – Circumstances in which Recognition may be Suspended or Refused

The UK registers some concern at the practical interaction of Article 8.2 and Article 7.2.

Article 8.2(b) is satisfactory since the party opposing recognition must show that the judicial sale has actually been nullified.

But Article 8.2(a) provides that an arrest in a second state may be suspended if the court of the judicial sale has suspended the sale and its effects.

It is not clear to us what “*suspension*” is, or how it might work. An English court might accept a claim that the sale be challenged, and might refuse to strike out such a claim, saying that an arguable case had been made out, but we do not believe there is any available procedure to “*suspend*” a sale.

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